NO. _____

IN THE

Supreme Court of the United States

October Term, 1990

KATHLEEN R. SWAN and WILLIAM O. SWAN,

Petitioners,

v.

THE STATE OF WASHINGTON,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE
STATE OF WASHINGTON

PETITION FOR WRIT OF CERTIORARI

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September 18, 1990

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Washington Child Hearsay statute, RCW 9A.44.120, which requires a finding that a hearsay statement by a child in a sexual assault case have "sufficient indicia of reliability" violates the Sixth Amendment Confrontation Clause of the United States Constitution, which requires a finding of "particularized guarantees of trustworthiness."

II. Whether admission of hearsay statements by two 3-1/2-year-old children, ruled incompetent and therefore unable to testify at trial, is violative of the Confrontation Clause of the Sixth Amendment of the United States Constitution, where reporters of hearsay were predisposed to find sexual abuse, where successive hearsay statements were admitted which were made over a period of months after the initial

disclosures and where the children had been tainted by the earlier interviews?

III. Approximately one week after the initial disclosures to the daycare owner and interview with the Child Protective Service caseworkers, the child who was not related to the petitioners was jointly interviewed by a police officer and prosecutor. During this interview the child falsely stated that Jerry (her father's name) had molested her in the same very unusual way that she alleges the petitioners had molested her, and further falsely stated that she had previously reported this to the daycare owner, and made no accusations against the petitioners. Under these circumstances, can her earlier hearsay statements, or her two later hearsay disclosures, be deemed to have particularized guarantees of

trustworthiness as required by the Sixth Amendment?

IV. Where a finding of incompetence to testify is based on a young child's inability to understand her obligation to tell the truth, can a finding that her earlier statements possessed particularized guarantees of trustworthiness ever be made?

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

KATHLEEN R. SWAN and WILLIAM O. SWAN,

Petitioners,

v.

THE STATE OF WASHINGTON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

Petitioners Kathleen R. Swan and William O. Swan pray that a writ of certiorari issue to review the judgment of the Supreme

Court of the State of Washington, dated May 3, 1990.[1]

OPINIONS BELOW

The unpublished opinion of the Court of Appeals of the State of Washington, Division One, filed May 16, 1988 (attached hereto as Appendix A), reversed petitioners' convictions and ordered a new trial. The opinion of the Supreme Court of Washington, filed May 3, 1990, and reported at 114 Wn.2d 613, ___ P.2d ____ (1990) (attached hereto as Appendix B) reversed the Washington Court of Appeals and affirmed petitioners' convictions. A copy of the Washington State Supreme Court's Order Clarifying Attorneys' Status in Opinion and Denying Motions for Modification and Reconsideration, dated

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[1]The parties to this case are all named in the caption.

June 22, 1990, is attached hereto as Appendix C.

JURISDICTION

The Supreme Court of Washington's opinion was filed on May 3, 1990. Petitioners' motion for reconsideration was denied on June 22, 1990. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

This case involves the Confrontation Clause of the Sixth Amendment of the United States Constitution, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

This case also involves the following provision of the laws of the State of Washington:

> RCW 9A.44.120. "Admissibility of child's statement - Conditions"
>
> A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, not otherwise admissible by statute or court rule, is admissible in evidence in dependency proceedings under Title 13 RCW and criminal proceedings in the courts of the state of Washington if:
>
> (1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
>
> (2) The child either:
>
> (a) Testifies at the proceedings; or
>
> (b) Is unavailable as a witness: Provided, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.
>
> A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his intention to offer the statement and the particulars of

> the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement.

STATEMENT OF THE CASE

William Swan and Kathleen Swan, husband and wife, were convicted of two counts of statutory rape in the first degree on April 17, 1986, and subsequently sentenced to fifty month prison sentences in the Superior Court of King County, Washington.

William and Kathleen Swan had never before been accused, arrested, nor charged with a crime. William Swan is an electrical engineer who met his wife in graduate school where she was studying French. Kathleen Swan, a Phi Beta Kappa college graduate, is a linguist by profession who is fluent in thirteen languages. Both William and Kathleen Swan vehemently denied the allegations that they sexually abused their child, Elizabeth "Beth Anne," or her friend, Rachel Thiel.

Several witnesses testified to their good relationship with their daughter and their good character.

The material evidence against them consisted solely of the hearsay statements of their then 3-1/2-year-old daughter Beth Anne Swan and her 3-1/2-year-old friend, Rachel Thiel, neither of whom testified at trial due to their incompetence. The incidents allegedly occurred at some undetermined time between January and October of 1985.

These hearsay statements of Beth Anne Swan and Rachel Thiel were introduced through Cindy Bratvold, the owner of the home daycare the children attended; Lisa Conradi, a worker at the daycare, who obtained the initial statements from Beth Anne Swan the first day she met her; CPS caseworker Carol Schmidt; Jerry Thiel, the father of Rachel Thiel; and Cindy

Hermansen, Beth Anne's foster mother after she was removed from the Swan's. The admitted hearsay statements were made over a period of eight months from the date of the initial disclosure.

Beth Anne Swan attended the Cindy Bratvold daycare from June of 1983 until October 4, 1985. Lisa Conradi was hired at the daycare on October 1, 1985, at which time Bratvold gave her a rundown on the children and told her that Beth Anne Swan often had her hands in her pants and she was, therefore, concerned about the possibility of abuse.

Neither Beth Anne Swan nor Rachel Thiel were at the daycare on October 1, 1985, Conradi's first day of work. It was on the first day that Conradi met Beth Anne Swan, October 2, 1985, that disclosures were allegedly first made. At that time, Bratvold was gone from the daycare, running

errands, and Conradi saw Beth Anne Swan and noticed that she had her dress tucked into her tights. Conradi, who was extremely predisposed to find child abuse in that she had reported child abuse at least 20 other times, including at other daycares where she worked[2], instructed Beth Anne it wasn't all right for others to see her private parts and then explained to Beth Anne what was meant by private parts. Conradi then proceeded to question Beth Anne and claims that she obtained statements from Beth Anne to the effect that she was sexually abused by her mother and father. However, there were no other witnesses present and Conradi took no notes of the interview, either at

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[2]In a post-trial tape recorded interview, Conradi bragged that she had reported child abuse on at least 20 other occasions and had reported child abuse at every other daycare at which she worked. However, this information was not available at trial and the prosecutor argued that Conradi was "neutral."

the time or soon afterwards. When Bratvold returned from her errands, Conradi told her what Beth Anne supposedly said, and Child Protective Services ("CPS") was called.

CPS caseworkers Carol Schmidt and Ken Pattis responded and questioned Beth Anne outside of Conradi's and Bratvold's presence for 30 minutes, using leading questions in an attempt to obtain the information that Conradi claimed Beth Anne told her. According to Schmidt, she and Pattis "became frustrated and could not elicit anything from this child . . ." and Schmidt then asked Conradi to help with the interview because Beth Anne would make no statements about being sexually abused. At this point Conradi asked Beth Anne if she remembered telling her that mommy spits on her or that daddy puts his penis in her mouth. The CPS caseworkers said that Beth Anne nodded.

The CPS caseworkers told Conradi and Bratvold that there was insufficient cause to remove the children from the daycare and that another interview was necessary. Bratvold told the daycare workers that Beth Anne said that she played these "games" with her friend, Rachel Thiel, and Bratvold told the CPS caseworkers that she would interview Rachel the next day. The CPS caseworkers told her to go ahead and do so but to not use "leading questions."

The next day Cindy Bratvold, who had no training in questioning children about abuse, questioned Rachel Thiel alone. She claims that Rachel Thiel told her that William and Kathleen molested her, explaining that they played "happy birthday games with Uncle Bill" and that they "played marbles and birthday candles" and he put "candles in her peepee and marbles in her peepee." Bratvold took no notes of

the interview, either contemporaneously or thereafter, and there were no other witnesses present.

The following day, October 4, CPS caseworkers returned to the Bratvold daycare to interview Beth Anne Swan and Rachel Thiel. CPS caseworker Schmidt attempted to interview both the girls together but had no success. During this time Conradi sat at a table with both the girls and reminded them what they had told her and Bratvold the day before. CPS caseworker Schmidt then questioned Rachel separately and Rachel repeated her allegations against the Swans including her statement that Kathleen touched her bottom, put something in her peepee, and there was blood on her bottom. Through the use of leading questions, Rachel supposedly stated that William and Kathleen put birthday

candles in her potty, put marbles in her potty, and played happy birthday games.

Following this, Schmidt interviewed Beth Anne Swan. At the start of the interview she told Beth Anne that she talked to Rachel and explained "some of the things" that Rachel had told her. It was not until 15 minutes of coaxing that Beth Anne would answer any questions, and only then to very leading questions. Of great importance is the following:

> [CASEWORKER SCHMIDT]: Before I asked that question [about the happy birthday games], I told her that I had talked to Rachel and that I knew about some games that she played and I wanted to know if she played them and she said yes.
>
> [QUESTION BY THE PROSECUTOR]: Did you ask her for descriptions of those games?
>
> [SCHMIDT]: I believe I attempted, but she would not respond. (Emphasis supplied).

Schmidt also asked Beth Anne "if her mother spits on her potty and she said yes." She

then asked "where her dad puts his peepee" and Beth Anne said on her potty.[3]

The police were called, Rachel Thiel was sent home and Beth Anne Swan was removed to a foster home, and dependency proceedings were begun. The Swans have had no contact with either child since that date.

A crucial factor that by itself should have been sufficient to declare Rachel's statements unreliable was the October 11, 1985 interview by Detective Marlin Bachler who was assigned to the Sexual Assault Unit of the King County Police Department and a King County Deputy Prosecuting Attorney from their Special (sexual) Assault Unit. On that date Beth Anne Swan and Rachel

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[3]The court prohibited William Swan from testifying that Beth Anne used the term "potty" to describe the bathroom and had on occasion yelled, "Daddy is in my potty," when he was using the bathroom and she wanted to enter.

Thiel were interviewed at the prosecutor's office.

Consistent with what later occurred at the pre-trial hearings, Beth Anne Swan would not respond to any questions by the prosecutor or the detective regarding the allegations of sexual abuse. In stark contrast to Beth Anne Swan, Rachel Thiel readily answered questions during the interview. However, she never accused the Swans and when she was asked who sexually abused her, she stated that "Jerry (her father's name) put marbles there" (which was the same allegation she had made to Cindy Bratvold against the Swans) and that she had told this to Cindy Bratvold.[4] Detective Bachler testified at trial that his notes reflected that the following occurred during that interview:

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[4]Cindy Bratvold's testimony included no suggestion that Rachel had made such a statement to her or ever mentioned "Jerry."

> Q [OFFICER BACHLER] Do you know there are parts of a body where we shouldn't be touched?
>
> There was no answer. However, she (Rachel) pointed to her genital area.
>
> Q. [OFFICER BACHLER] Did anybody ever touch you there?
>
> A. [RACHEL] No. Jerry put marbles there.
>
> Q. [OFFICER BACHLER] We heard that statement. We heard that you told somebody about this. Who did you tell?
>
> A. [RACHEL] Cindy.
>
> That was the extent of the interview.

Neither the detective nor the prosecutor attempted to elicit any other information regarding this allegation and Jerry Thiel was never charged with an offense. In fact, the State called Jerry Thiel as a witness at trial where he testified that he had never molested his daughter Rachel.[5]

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[5]The state conceded in their brief in the Washington Supreme Court that Rachel's statement that Jerry molested her "was incorrect" and "more likely to be wrong." Brief of Respondent at 40, n. 16.

Besides all of the foregoing hearsay statements, the State was also allowed to introduce a statement by Rachel Thiel to her father, Jerry Thiel, during a car ride on October 17, 1985 (two weeks after the initial disclosures) where Rachel supposedly said, "Bill and Kathy are bad, they put marbles in her [Rachel's] bottom."

Cindy Bratvold was also permitted to testify that in approximately January of 1986 (three months after the initial disclosure) Rachel told her that her finger was burned and she got a bump on her head when Bill put a candle in her potty and lit it (which would have occurred sometime prior to October 4, 1985 since she had no contact with the Swans since that date), although on inspection Bratvold saw no evidence of a burn.

The State was also permitted to call Cindy Hermansen, who was Beth Anne Swan's

foster mother beginning on October 4, 1985, the day she was removed from the Swan's house. Over objection she was permitted to testify as a rebuttal witness that in approximately March of 1986 (seven or eight months after the initial disclosure), Beth Anne told her that her mommy and daddy put marbles in her potty. When Hermansen sent her son to get marbles to show her, Beth Anne Swan supposedly said it was actually "a snake full of marbles."

Neither child testified at trial. Beth Anne Swan appeared at a pre-trial hearing and would not answer any questions. However, Rachel Thiel was very comfortable on the stand and answered all questions although she misstated several things and demonstrated that she could be easily led. When the judge asked her the color of her dress, she testified that her dress was

blue and white, which was correct. However,

> [THE COURT]: If I tell you it's a pink dress, is that a truth or a lie?
>
> [RACHEL THIEL]: Well, it's blue, sort of, but it's pink.
>
> [THE COURT]: It's blue but it's pink?
>
> [RACHEL THIEL]: Yes.
>
> [THE COURT]: I don't have any more questions.

No questions were asked Rachel to determine whether she had a memory of the allegations or what she supposedly told Bratvold or CPS caseworker Schmidt.

The court therefore found that Rachel was incompetent to testify based upon "her ability to understand the obligation to speak the truth and her ability to remember accurately and express past events. . . ."

Both girls were declared to be incompetent and therefore unavailable and did not testify at trial. All the

foregoing hearsay statements were admitted pursuant to RCW 9.44.120, the Washington Child Hearsay Statute.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

Petitioners' counsel raised the Sixth Amendment Confrontation Clause issue at trial in challenging the admission of the hearsay statements. Petitioners argued in their brief on appeal before the Washington Supreme Court that the introduction of these hearsay statements violated their rights under the Sixth Amendment of the United States Constitution and that the Washington Child Hearsay Statute, RCW 9A.44.120, was unconstitutional.

The Supreme Court of Washington held that the Washington Child Hearsay Statute was constitutional and did not violate the Sixth Amendment. State v. Swan, 114 Wn.2d 613, 667-668, ___ P.2d ___ (1990). With regard to petitioners' claim that the

introduction of the hearsay statements under the facts of the case violated the Sixth Amendment Confrontation Clause, the court, while not specifically referring to the Sixth Amendment, held that the trial court did not abuse its discretion in finding both girls' hearsay statements reliable pursuant to RCW 9A.44.120, which requires that the court must find "that the time, content, and circumstances of the statement provide sufficient indicia of reliability." State v. Swan, 114 Wn.2d at 647.

REASONS FOR GRANTING THE WRIT

A. The Washington Child Hearsay Statute, RCW 9A.44.120, Violates the Sixth Amendment Confrontation Clause.

In Ohio v. Roberts, 448 U.S. 56, 66, 65 L.Ed.2d 597, 100 S.Ct. 2531 (1980), this Court held:

> In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his

> statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

See also, Idaho v. Wright, 497 U.S. ___, 111 L.Ed.2d 638, 653, 110 S.Ct. ____ (1990).

The Washington Child Hearsay Statute, RCW 9A.44.120, is not a firmly rooted hearsay exception. See State v. Ryan, 103 Wn.2d 165, 170, 691 P.2d 197 (1984) ("RCW 9A.44.120 is not within the category of firmly rooted hearsay exceptions . . .")

The Washington Child Hearsay Statute permits the admission of hearsay evidence in circumstances where there are merely "sufficient indicia of reliability." See RCW 9A.44.120. This language does not comport with the standard the Court articulated in Ohio v. Roberts, id., and

Idaho v. Wright, 111 L.Ed.2d at 656. Rather, it states a significantly less stringent test for admissibility, inviting an open-ended and unfocused inquiry regarding reliability. For this reason, the Washington Child Hearsay statute must be declared unconstitutional on its face as violative of the Sixth Amendment Confrontation Clause.

B. The Decision of the Supreme Court of Washington is in Conflict With the Decision of this Court in Idaho v. Wright and the Language of the Sixth Amendment in that it Permitted the Introduction of Untrustworthy Hearsay Statements.

The Washington Supreme Court decided this case on May 3, 1990, and denied petitioners' motion for modification and reconsideration on June 22, 1990. This court decided Idaho v. Wright, on June 27, 1990.[6]

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[6]Following this Court's decision in Idaho v. Wright, petitioners filed a motion in the Supreme Court of Washington on June 28, 1990, for recall of mandate, withdrawal of opinion, and for rebriefing and re-

The Washington court did not have the benefit of the Idaho v. Wright decision at the time that it issued its opinion and denied the motion for modification and reconsideration. Idaho v. Wright is a case that is factually similar and nearly legally identical to the instant case. Any dissimilarity between Idaho v. Wright and the instant case is that in Idaho v. Wright the hearsay statements were very brief and were only made on one occasion.

Here, hearsay statements made by Beth Anne Swan on three separate occasions stretching over a nine month period of time were introduced. With regard to Rachel Thiel, four hearsay statements made over a period of approximately four months were introduced. Unlike Idaho v. Wright, where the statement was very limited, here the

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argument based on this decision. On July 3, 1990, the Washington Supreme Court summarily denied this motion.

hearsay statements were extensive and involved. This Court's ruling on the admissibility of child hearsay under the Sixth Amendment Confrontation Clause in Idaho v. Wright mandates reversal of the Swans' convictions.

The Washington Supreme Court, in finding that the children's statements had sufficient indicia of reliability, relied strongly upon "cross-corroboration," -- that is, finding that both children told similar stories. An examination of their actual statements shows that their stories differed substantially. Nevertheless, even if there was some similarity between their alleged hearsay statements, this was easily explained by the fact that Conradi reported to Bratvold what Beth Anne Swan supposedly said. Bratvold then conducted an examination of the second child with the object of obtaining similar disclosures.

Even assuming, arguendo, that the first statements made by the first child to Conradi had sufficient guarantees of trustworthiness, the second set of statements by Rachel Thiel must fail under the Idaho v. Wright test given Bratvold's obvious predisposition, knowledge, and motivation to obtain similar statements. Furthermore, unlike the reporter of the hearsay in Wright who was "a pediatrician with extensive experience in child abuse cases," 111 L.Ed.2d at 648, here Bratvold was untrained, and obviously biased because of her personal involvement as owner of the daycare where child abuse was first disclosed.

Moreover, even assuming, again arguendo, that the initial statement made by Beth Anne Swan to Lisa Conradi and those by Rachel Thiel to Cindy Bratvold had sufficient guarantees of trustworthiness,

the same cannot be said concerning the interviews conducted by the CPS workers the following day. Both 3-1/2-year-old children had been already thoroughly questioned, had allegedly made disclosures, had been subjected to continued leading questions, and their memories had been undoubtedly tainted by the questioning process. Importantly, Conradi conceded she again spoke to both of them about their prior disclosures just before their being questioned by the CPS workers assisted by Cindy Bratvold. Under these circumstances, their secondary statements to the CPS workers can hardly be deemed to have particularized guarantees of trustworthiness, as required under the Confrontation Clause. Idaho v. Wright, 111 L.Ed.2d at 655, 659-660.

To the extent that the Washington Court found sufficient reliability based on

cross-corroboration, in that both children supposedly gave similar statements, this Court's opinion in Idaho v. Wright rejects this as a proper test of reliability. See 111 L.Ed.2d at 658. This is especially the situation here since Bratvold, the second reporter of the allegation of child abuse, had been informed by Conradi of the details of the allegations. Furthermore, these children were close friends and not only were together prior to the reporting, but were placed together after the initial reporting and prior to the very important interviews by the CPS workers.

Moreover, hearsay statements were erroneously found to be reliable even though they were made by Rachel Thiel approximately two weeks after the initial disclosure. By this time she had been interviewed by the owner of the daycare, by a CPS worker, by a physician conducting

a medical examination, and by the police.[7]

Presumably she had also been questioned by her parents and other persons. Again, regardless of a decision as to the reliability of the earlier statements, her hearsay statements two weeks later to her father, and approximately four months later to Bratvold regarding an allegation of a burned finger and sexual abuse, cannot be deemed to be reliable. The same is true of Beth Anne Swan concerning her hearsay statement made to the foster mother approximately eight months after the first disclosure.

Finally, it must be stressed that Rachel Thiel was found by the trial judge to be incompetent based not on her inability "to communicate with the jury," see Idaho v. Wright, 111 L.Ed.2d at 658, but based on

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[7]At which time she made a false disclosure. See supra, at 17-18.

her inability to understand the obligation to speak the truth and to remember accurately and express past events. Since she was never asked any questions concerning her memory of the alleged abuse, this finding related solely to her inability to receive "just impressions of the facts and of relating them truly." Id. This is much different than a situation where a child merely has no memory or is unable to speak in court. Here, it was demonstrated that the child was easily led and unable to communicate truthfully. Under these circumstances, a finding that the child's earlier statements possessed particularized guarantees of trustworthiness cannot be sustained.

State v. Paster, 524 A.2d 587 (R.I. 1987) is directly on point on the issue of competency. There, a four year old alleged victim of sexual abuse was ruled

incompetent by the trial judge on the ground that she could not recollect, communicate or appreciate the necessity of telling the truth. The child's hearsay statements were nonetheless admitted as an exception to the hearsay rule.[8] In reversing the case, the Rhode Island Supreme Court correctly explained that incompetency at the time of trial based on an inability to communicate truthfully will usually mandate a finding that the child was also incompetent (and therefore unreliable) at the time of making the statement:

> When a trial justice has ruled a witness incompetent to testify because the justice is not convinced that the witness is capable of relating a capacity to observe, to recollect, to communicate, or to appreciate truthfulness, the justice has already made the determination

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[8]While the statements were admitted pursuant to the excited utterance and medical history exceptions, the issue of competency and reliability is identical to the instant case.

> that the witness's assertions are unreliable. Though there may be instances in which a witness is competent at the time he or she makes an assertion and later, at the time of trial, due to the onset of senility or mental illness, is incompetent, such does not hold true with infants. If an infant is ruled incompetent at the time of trial because she is only four years old, assertions made by that infant a year earlier cannot be considered inherently more reliable. Logic dictates that, if anything, they are less reliable.

Id. at 590.

CONCLUSION

For the foregoing reasons, the Washington Supreme Court's decision in this case cannot stand following Idaho v. Wright. The Washington court did not correctly consider and examine petitioners' Sixth Amendment Confrontation Clause challenges in affirming their convictions. The court utilized unreliable hearsay statements and improperly "bootstrapped" these hearsay statements with other

unreliable hearsay statements and other likewise unreliable "corroboration."

This Court is urged to grant petitioners' writ of certiorari and reverse their convictions.

DATED this 18th day of September, 1990.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. WILLIAM ORR SWAN and KATHLEEN ROWLAND SWAN, and each of them, Appellants.	NO. 20937-0-I DIVISION ONE FILED: May 16, 1988

GROSSE, J. -- William and Kathleen Swan each appeal their convictions on two counts of statutory rape. The two counts pertain to the two victims involved: B.A., the daughter of the appellants, and R.T., a friend and playmate of B.A. At the time the incident came to light, both children were 3 years old.

The charges arose out of statements made on October 2, 1985, by B.A. to a day-care worker. In these statements B.A. revealed facts evidencing sexual abuse of B.A. and

her friend R.T. by the appellants. Children's Protective Services (CPS) was notified and interviewed B.A. on October 2 but the results of this interview proved insufficient in CPS's judgment to justify removal of B.A. from her home. On October 3, the owner of the day-care center, Cindy Bratvold, interviewed R. T. who made statements similar to those earlier reported from B.A. On October 4, CPS again visited the day-care center and interviewed both children separately. R. T. repeated the story told to bratvold on October 3, while B. A. confirmed her earlier statements. After the interviews of October 4, B.A. was removed from appellants' home and placed in foster care. The following week she was examined by a nurse practitioner for evidence of sexual abuse. Some time later she was examined by her own pediatrician. R. T. was

examined approximately 1 week after the allegations. None of these examinations revealed any conclusive physical evidence of sexual abuse.

Of the nine issues raised on appeal, eight remain,[1] but our disposition of appellants' challenge to the admissibility of the children's statements through hearsay testimony is dispositive. Appellants contend that both B.A.'s and R.T.'s statements to witnesses Conradi, Bratvold, and Schmidt were unreliable and their admission prejudicial.

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[1]Appellants raise the issue of the constitutionality of their being charged with first degree statutory rape rather than incest. This issue was resolved in State v. Hodgson, 44 Wn. App. 592, 722 P.2d 1336 (1986), aff'd in part, rev'd in part, 108 Wn.2d 662, 740 P.2d 848 (1987), wherein the court determined that the two crimes involved different elements and thus the determination by the prosecutor to charge under one statute rather than the other does not impinge on a defendant's constitutional rights.

The pertinent statute is RCW 9A.44.120 which provides:

> A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, not otherwise admissible by statute or court rule, is admissible in evidence in dependency proceedings under Title 13 RCW and criminal proceedings in the courts of the state of Washington if:
>
> (1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
>
> (2) The child either:
>
> (a) Testifies at the proceedings; or
>
> (b) Is unavailable as a witness:
>
> Provided,
>
> That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

At trial, pursuant to the statute, the State offered statements of the children through the hearsay testimony of witnesses Conradi, Bratvold, and Schmidt. Because

of the children did not testify,[2] their

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[2]The trial court conducted pretrial hearings on B.A.'s and R.T's competency to testify at trial and found them both incompetent. The test of the competency of a young child as a witness is:

> "(1) an understanding of the obligation to speak the truth on the witness stand; (2) the mental capacity at the time of the occurrence concerning which [she] is to testify, to receive an accurate impression of it; (3) a memory sufficient to retain an independent recollection of the occurrence; (4) the capacity to express in words [her] memory of the occurrence; and (5) the capacity to understand simple questions about it."

State v. Przybylski, 48 Wn. App. 661, 664, 739 P.2d 1203 (1987) (quoting State v. Allen, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967)). The determination of a witness's ability to meet the requirements of the test lies within the sound discretion of the trial judge and will not be disturbed on appeal in the absence of proof of a manifest abuse of that discretion. State v. Justiniano, 48 Wn. App. 572, 578, 740 P.2d 872 (1987).

B.A. refused to answer any questions and was properly determined to be incompetent to testify. While R.T. was responsive to questions, the court found R.T. incompetent on two grounds: (1) R.T.'s inability to understand the obligation to tell the truth, and (2) her ability to remember accurately and express past events. The record demonstrates that there was no abuse of discretion on the part of the trial

statements could only be admitted if (1) they fell within a firmly rooted hearsay exception; or (2) in the alternative, the admission of the statements was accompanied by a showing of particularized guarantees of trustworthiness;[3] and (3) there is corroboration of the act or acts of abuse.[4]

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court in finding R.T. incompetent to testify.

[3]Since the child sexual abuse exception is not a "firmly rooted" hearsay exception, particularized guarantees of trustworthiness are required before the hearsay is admissible, thus requiring a higher standard of reliability as a substitute for a traditional hearsay exception. State v. Slider, 38 Wn. App. 689, 696, 688, P.2d 538 (1984). See also Ohio V. Roberts, 448 U.S. 56, 66, 65 L. Ed. 2d 597, 100 S. Ct. 2531 (1980); State v. Ryan, 103 Wn.2d 165, 170, 691 P.2d 197 (1984).

[4]Whenever the alleged child victim is unavailable as a witness, RCW 9A.44.120(2)(b) requires there also be corroborative evidence of the act before any reliable hearsay statements are admitted. This requirement provides the additional protection needed against fabricated allegations where the defendant is not able to cross-examine the child

> RCW 9A.44.120 permits the use of an otherwise admissible statement by a victim of sexual abuse under the age of 10 when the court finds that the circumstances of the statement provide sufficient indicia of reliability. The determination of whether a statement is admissible . . . is within the sound discretion of the trial court.

(Footnote omitted.) State v. Hancock, 46 Wn. App. 672, 675-76, 731 P.2d 1133 (1987) (citing State v. Frey, 43 Wn. App. 605, 611, 718 P.2d 846 (1986).

In State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984), the Supreme Court set out nine factors to be applied when determining whether hearsay statements are sufficiently reliable for admission. These nine factors are:

> (1) whether there is an apparent motive to lie; (2) the general character of the declarant; ;(3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; (5) the timing of the declaration and

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declarant. State v. Hunt, 48 Wn. App. 840, 847-48, 741 P.2d 566 (1987).

> the relationship between the declarant and the witness; (6) the statement contains no express assertion about past fact; (7) cross examination could not show the declarant's lack of knowledge; (8) the possibility of the declarant's faulty recollection is remote; ;and (9) the circumstances surrounding the statement are such that there is no reason to suppose the declarant misrepresented defendant's involvement. These factors must be substantially met before a statement is demonstrated to be reliable.

(Citations omitted.) State v. Cooley, 48 Wn. App. 286, 294, 738 P.2d 705 (1987).

The trial court's rulings with respect to the statements demonstrate careful consideration of the Ryan factors as they apply to the facts of this case. We have reviewed the record and find that it supports the trial court's rationale. There was no abuse of discretion on the part of the trial court in finding the statements reliable; the Ryan factors were substantially met. However, it is also clear from a review of the record that the

trial court failed to look to the statutorily required element of corroboration prior to its ruling on the admissibility of the hearsay testimony. Separate determinations as to reliability and corroboration must be made when a child is unavailable. State v. Ryan, supra at 174.[5]

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[5]We will review the record to determine whether the trial court's failure to make a determination as to corroboration was prejudicial, warranting reversal. Usually, this determination should be made concurrently with the determination as to reliability. However, State v. Ryan, does indicate that they are separate determinations and we recognize that there may be cases wherein the court will first determine reliability and admit the testimony conditionally, subject to corroboration being shown in the course of the State's case in chief. In any event, both the determination as to reliability and that as to corroboration are preliminary matters subject to the provisions of ER 104(a).

ER (104(a) provides that the trial court is not bound by the rules of evidence in deciding the admissibility of evidence, or in making preliminary rulings on matters such as the suppression of evidence. 5A K. Tegland, Wash. Prac., Evidence § 573 (2d ed. 1982). Accordingly, we will review the

A recent case by this court thoroughly discussed the requirement of corroborative evidence, State v. Hunt, 48 Wn. App. 840, 741 P.2d 566 (1987). Hunt makes clear that corroborative evidence is evidence supplementary to that given, that is the hearsay testimony, tending to strengthen and confirm that hearsay testimony. It encompasses both direct and indirect evidence, e.g., physical evidence of sexual abuse, nightmares relating to abuse, confessions, and expert testimony with regard to typical behavior on the part of sexually abused children. See State v.

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record and consider, as the trial court could have, all of the evidence relevant to the corroboration issue, both direct and indirect, admissible and inadmissible. This includes physical findings and expert opinions, including one doctor's opinion as to the significance of the absence of hymen tissue in a 20 to 3-year-old girl and her proffered opinion, which was refused, regarding the significance of B.A.'s distraught behavior during genital examinations.

Hunt, supra at 848 (summarizing prior cases). In short, as set forth in Hunt, at 849:

> In the context of RCW 9A.44.120, we find that "corroborative evidence of the act" requires that there be "evidence of sufficient circumstances which would support a logical and reasonable inference" that the act of abuse described in the hearsay statement occurred. Bremerton v. Corbett, [106 Wn2d 569, 723 P.2d 1135 (1986)] at 578-79; cf. State v. Spronk, 379 N.W.2d 312, 314 (S.DC. 1985) (corroboration requirement of child abuse hearsay exception required evidence "which in some substantial degree tends to affirm" that the charged act of sexual abuse occurred).

In the instant case, the record with respect to corroboration is weak. Certainly, to some degree, R.T.'s statements corroborate those of B.A. and to some degree B.A.'s statements corroborate those of R.T. However, under the circumstances of this case we do not believe that this corroborative evidence is, standing alone, sufficient to lead to

the requisite "logical and reasonable inference."

As to B.A., there is additional evidence. Approximately 1 week after the revelations a nurse practitioner, Ritter, examined B.A. for sexual abuse. He observed that her genitalia area was slightly reddened and that the vaginal opening was slightly enlarged, although he made no actual measurements of the opening. At trial, with objection, he estimated the size of the opening as 1 - 1.2 centimeters. Ritter admitted that the did not look for or notice a hymen, but that he could see into the vagina. He also remarked that B.A. was upset over having an exam and very distraught over a genital exam.

Dr. Parris, the Swan's family physician, examined B.A. on October 9. He observed no signs of external injury. He noted that the vaginal area was slightly red and that

there was a slight discharge, which he opined was norma. He also did not make a note of the presence or absence of a hymen. Dr. Parris concluded that B.A.'s vaginal area was essentially normal. He also testified that B.A. was very anxious about having a genitalia exam, but explained that such anxiety was not unusual in a child of 3 years. He said that children's reaction to examinations is highly variable, but, while B.A.'s behavior was within the normal range, such behavior could also be exhibited by an abused child.

Dr. Jenny, Medical Director of the Sexual Assault Center at Harborview Medical Center, did not examine B.A. but reviewed the notes and findings of Ritter and Parris and gave opinions on the significance of certain of the findings or absence

thereof.[6] She opined that Ritter's estimate of the diameter of B. A.'s vaginal opening, 1 - 1.2 centimeters, was over twice the normal size for a child of her age. She testified, contrary to Parris, that vaginal discharge in young girls was highly unusual and that the absence of hymen tissue in a 2- to 3-year old girl was indicative of trauma, but she could not say

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[6]Appellants contend that the court commented on the evidence when it ruled to accept Dr. Jenny as an expert regarding sexual abuse of children. In determining whether words or actions amount to a comment on the evidence the court looks to whether the action or words of the trial court either directly or by implication suggested the court's opinion or feelings as to the credibility, sufficiency or weight of the evidence. State v. Jacobsen, 78 Wn.2d 491, 95, 477 P.2d 1 (1970). Dr. Jenny was extensively questioned about her qualifications, and, after hearing the testimony, the court ruled to accept her as such an expert. The court's ruling merely indicates that the threshold query provided in ER 702 was satisfied. The court offered no opinion as to the credibility, sufficiency, or weight of Dr. Jenny's testimony.

that the trauma was necessarily the result of sexual abuse.[7] She also stated that the increased redness of the vaginal area could have been due to poor hygiene or infection, rather than trauma.

While this evidence of abuse of B.A. is equivocal and conflicting on some points it is sufficient to permit a logical and reasonable inference that abuse occurred. The corroboration as to B.A. is sufficient.

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[7]We note that neither the nurse practitioner nor Dr. Parris testified that hymenal tissue was absent and Dr. Jenny did not herself examine B.A. This testimony was the subject of a defense objection at trial based upon insufficient foundation and, on appeal, error has been assigned to its admission based upon speculation. Thus, were we to reach this issue we would be unlikely consider it on appeal. See State v. McKinney, 50 Wn. App. 56, 65, 747 P.2d 1113 (1987) ("A party may only assign error on appeal based on the specific ground of the evidentiary objection made at trial.") Four our purposes here, in determining whether there is corroborative evidence, we do not attach significance to Dr. Jenny's testimony that the tissue was absent.

There was no prejudice to the defendants to specifically consider the issue of corroboration as to B.A.

We cannot reach a similar conclusion as to the statements by R.T. Her statements were to the effect that she was a co-participant and co-victim. However, her physician testified at trial that he gave R.T. a complete physical exam on October 4 and that there was nothing in the physical exam that would support sexual abuse. He also stated that he could not make a determination as to whether or not R.T. was abused..

Schmidt, a caseworker with CPS, did testify to R.T.'s play with an anatomically correct female doll--pointing to the vaginal area and saying that appellants put marbles and candles in her "potty". This could be considered as corroborative in the sense that it might demonstrate unusual

sexual awareness on the part of R.T. but there is nothing in the record to support such a conclusion. We also must note that neither Schmidt nor any other witness testified that R.T.'s play with the anatomically correct doll was indicative of sexual abuse or indicative of behavior inappropriate for a child of her age. There was no expert testimony in this case with regard to the behavioral characteristics that evidence sexual abuse. The State points to testimony indicating that R. T. And B.A. would stand close together, grab their crotches and giggle as being corroborative. Again, the lack of expert testimony as to just what this behavior indicates frustrates drawing any reasonable inference of corroboration from this testimony.

It is also true that R.T.'s father testified to her complaints of pain in the

vaginal area. But, these complaints occurred months after the abuse allegedly occurred and ceased 1 month before the allegations came to light. In addition, R. T.'s father testified that they took her to the doctor because of complaints and that the complaints could not be medically substantiated. The only other evidence that the State can point to, or that this court has found in an exhaustive review of the record, that might tend to corroborate R.T.'s statements is the statement made by R.T. to Bratvold that her finger had been burned. However, this cannot be considered for purposes of corroboration because it was offered as part of the hearsay testimony at issue. The State offers no hearsay exception under which this assertion of past fact would fall and we can find none. It would involve blatant "bootstrapping" to corroborate the hearsay

at issue with the same hearsay. Moreover, there is nothing in the record to correlate in time this complaint with the alleged abuse.

In sum, we have searched the entire record in an attempt to find sufficient corroboration to sustain the trial court's ruling admitting the hearsay testimony as to R.T. We are unable to do so. We believe that t he corroborative evidence is not sufficient to permit a logical and reasonable inference that R. R. was sexually abused. Therefore the trial court's error in admitting the statements of R.T. through hearsay was prejudicial.

The error as to R.T. requires a new trial as to both children because it cannot be said that the testimony as to R.T.'s statements did not influence the verdict as to V.A. See State v. Aaron, 49 Wn. App. 735, 745 P.2d 1316 (1987) (erroneous

admission of evidence requires reversal if it materially affected the outcome of the trial); State v. Sweeney, 45 Wn. App. 81, 723 P.2d 551 (1986).

The last issue which we will address is whether or not the testimony by Dr. Underwager was improperly excluded because the offer of such evidence is unlikely to occur on retrial.[8] Dr. Underwager proposed to testify on the validity and accuracy of a child's answers during an interview with an adult and to describe the factors which come into play and affect such an interview.

"The admissibility of expert testimony

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[8]Appellants also assign error to the denial of their motion for a new trial, the admission of certain rebuttal testimony, the refusal of testimony by Mr. Swan as to a name which B.A. called the bathroom, and the impropriety of the prosecutor's closing statements. In view of our disposition on the hearsay issues and the fact that these errors are not likely to recur on retrial, it is unnecessary to address them.

under [ER 702[9]] depends upon whether (1) the witness qualifies as an expert, (2) the opinion is based upon an explanatory theory generally accepted in the scientific community, and (30 the expert testimony would be helpful to the trier of fact." (Citations omitted.) State v. Allery, 101 Wn.2d 591, 596, 682 P.2d 312 (1984). The decision to admit expert testimony is within the sound discretion of the court, and will not be disturbed on appeal absent a showing of abuse of discretion. State v. Ciskie, 110 Wn. 2d 263, ___ P.2d ___ (1988).

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[9]ER 702 provides:

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

The court ruled to exclude Dr. Underwager's testimony because (1) it found that the proposed testimony covered an area within the common knowledge of the jury and (2) there was insufficient evidence of scientific acceptance of the factors and their application to research on interviewing sexually abused children. We have reviewed the record and find that id does not sufficiently establish the reliability of the expert's methodology, factors, or the principles which he proposed to use in his testimony. Accordingly, the trial court did not abuse its discretion in excluding the testimony.

We reverse and remand.

/s/ Grosse, J.

WE CONCUR:

/s/ Swanson, J.

/s/ Williams, J.

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Petitioner, v. WILLIAM ORR SWAN and KATHLEEN ROWLAND SWAN, and each of them, Respondents.	)	NO. 55393-9 EN BANC Filed _____

ANDERSEN, J. --

FACTS OF CASE

The two defendants in this child abuse case were convicted at a jury trial in the Superior Court of the State of Washington for King County. The Court of Appeals reversed in an unpublished opinion.[1] We reverse the Court of Appeals and reinstate the judgments and sentences imposed by the trial court.

At issue here is whether there was

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[1] State v. Swan, 51 Wn. App. 1036 (1988).

sufficient corroborating evidence to justify the trial court allowing into evidence the hearsay statements of one of the two child victims in this statutory rape case. There is unfortunately no way at all to resolve this issue other than by going into the sad details of the abuse which the jury by its verdict found that the two defendants, husband and wife, had inflicted on their own 3-year-old daughter and her 3-year-old playmate.

The defendants herein, William and Kathleen Swan, were each charged with two counts of statutory rape in November of 1985. The charges stemmed from statements made by their 3-year-old daughter, B.A., and her 3-year-old friend, R.T., to their day-care teachers and to a Child Protective Services (CPS) worker.

Before trial, the State gave notice of its intent to rely upon the child sexual

abuse hearsay exception set forth in RCW 9A.44.120, Washington's child victim hearsay statute.[2] This statute, set forth in full in the margin[3], creates an addition

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[2]As to what is and is not "hearsay" in the context of a child abuse case, see In re Penelope B., 104 Wn.2d 643, 709 P.2d 1185 (1985).

[3]At all times pertinent herein, the child victim hearsay statute read as follows:

"A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, not otherwise admissible by statute or court rule, is admissible in evidence in dependency proceedings under Title 13 RCW and criminal proceedings in the courts of the state of Washington if:

"(1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and

"(2) The child either:

"(a) Testifies at the proceedings; or

"(b) Is unavailable as a witness: Provided, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

"A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings

to the hearsay rule not included in the Rules of Evidence (ER) adopted by this court.[4] The trial court conducted pretrial hearings to determine B.A.'s and R.T.'s competency to testify at trial, found both girls incompetent to testify and admitted their earlier hearsay statements into evidence at the trial.

At trial, whenever one of the girl's hearsay statements was about to be solicited from a witness, questioning was stopped by the trial court, the jury was excused and voir dire examination was conducted to determine the reliability of the statements. In each instance involved in this appeal, the trial court found the children's hearsay statements to be reliable and admitted them into evidence.

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to provide the adverse party with a fair opportunity to prepare to meet the statement." RCW 9A.44.120.

[4] Penelope B., 104 Wn.2d at 650.

The jury found each defendant guilty of two counts of statutory rape, one count as to each victim. A defense motion for a new trial was denied, and each defendant was sentenced to 50 months in jail.

The defendants appealed, and the Court of Appeals reversed the convictions and remanded for a new trial because of the admission into evidence of R.T.'s hearsay statements. The Court of Appeals agreed that the girls' hearsay statements were reliable, but observed that the trial court had failed to consider whether the alleged abuse was corroborated by other evidence of sexual abuse as required by the child victim hearsay statute (RCW 9A.44.120). After reviewing the record, the Court of Appeals found sufficient corroboration of B.A.'s abuse but insufficient corroboration of R.T.'s abuse. That court held that a new trial was necessary on both counts for

each defendant.

After the State's motion for reconsideration was denied, the State sought discretionary review in this court. Review was deferred pending our opinion in State v. Jones, 112 Wn.2d 488, 772 P.2d 496 (1989). After the Jones opinion was filed, this court granted review of this case.

Although the principal issue before us is whether R.T.'s alleged abuse was sufficiently corroborated to render her hearsay statements admissible as evidence, 11 additional issues are also presented.

ISSUES

ISSUE ONE. Did the Court of Appeals err in finding insufficient corroboration of the alleged sexual abuse of R.T.?

ISSUE TWO. Did the trial court err in declining to grant a new trial on the basis of evidence claimed to be newly discovered?

ISSUE THREE. Did the trial court err in finding the child R.T. incompetent to testify?

ISSUE FOUR. Did the trial court err in finding the children's hearsay statements reliable under the child victim hearsay statute (RCW 9A.44.120)?

ISSUE FIVE. Did the trial court err in permitting the State to call rebuttal witnesses?

ISSUE SIX. Did the trial court err in not allowing a psychologist to testify for the defense as an expert?

ISSUE SEVEN. Did the trial court make a constitutionally prohibited comment on the evidence?

ISSUE EIGHT. Did the trial court err in its ruling regarding defendant William Swan's explanation of his daughter's use of the word "potty"?

ISSUE NINE. Did the deputy prosecuting attorney commit reversible error during the course of the State's closing argument?

ISSUE TEN. Is this court's "manifest abuse of discretion" review standard unconstitutional?

ISSUE ELEVEN. Is RCW 9A.44.120, the child victim hearsay statute, unconstitutional?

ISSUE TWELVE. Did the State's alleged failure to disclose that one of the State's witnesses had been sexually molested violate due process?

DECISION

ISSUE ONE.

CONCLUSION. After a careful consideration of the categories of allegedly corroborative evidence in this case, we conclude that there was indeed sufficient evidence before the trial court to support its determination that R.T.'s

statements were admissible under Washington law. Accordingly, the Court of Appeals ruling to the contrary must be reversed.

Under Washington's child victim hearsay statute, RCW 9A.44.120, a child's description of an "act of sexual contact performed with or on the child by another" is admissible as hearsay evidence in a criminal proceeding if the statement provides "sufficient indicia of reliability" and, if the child is unavailable as a witness, "there is corroborative evidence of the act."[5] The Court of Appeals has defined corroborative evidence of the act as "'evidence of sufficient circumstances which would support a logical and reasonable inference'" that the act of abuse described

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[5] State v. Jones, 112 Wn.2d 488, 489-90, 772 P.2d 496 (1989) (citing RCW 9A.44.120).

in the hearsay statement occurred.[6] The child victim hearsay statute requires separate determinations of reliability and corroboration when the child is unavailable to testify.[7]

The determination of whether there is corroborative evidence of the act involves balancing the goal of making child victim hearsay more readily available as evidence against the concern that the use of such hearsay should not create too great a risk of an erroneous conviction.[8] As we recently explained, "[t]he Legislature has offered no specific guidance on low this balance is to be struck. Similarly, we

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[6]State v. Hunt, 48 Wn. App. 840, 849, 741 P.2d 566, review denied, 109 Wn.2d 1014 (1987) (citing Bremerton v. Corbett, 106 Wn.2d 569, 578-79, 723 P.2d 1135 (1986)).

[7]State v. Ryan, 103 Wn.2d 165, 174, 691 P.2d 197 (1984); State v. Edmondson, 43 Wn. App. 443, 453, 717 P.2d 784, review denied, 106 Wn.2d 1016 (1986).

[8]Jones, 112 Wn.2d at 495.

feel it unwise to suggest any hard and fast rules. The determination must proceed case by case,..."[9]

The most effective types of corroboration in such cases, of course, are eyewitness testimony, a confession or admissions by the accused, and medical or scientific testimony documenting abuse.[10] In most cases of child sexual abuse, however, there is no direct physical or testimonial evidence.[11] The child victim is often the only eyewitness to the crime, and physical corroboration is rare because the sex offenses committed against children

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[9] Jones, 112 Wn.2d at 495.

[10] See The Corroboration of Sexual Victimization of Children, American Bar Ass'n, Child Sexual Abuse and the Law 103, at 107 (5th ed. 1984); Jones, 112 Wn.2d at 495.

[11] Penelope B., 104 Wn.2d at 647; Jones, 112 Wn.2d at 495; Hunt, 48 Wn. App. at 848.

tend to be nonviolent offenses such as petting, exhibitionism, fondling and oral copulation.[12] Physical corroboration may also be unavailable because most children do not resist, either out of ignorance or out of respect for authority.[13] Consequently, in order to give any real effect to the child victim hearsay statute, the corroboration requirement must reasonably be held to include indirect evidence of abuse.[14] Such evidence has included a child victim's precocious knowledge of sexual activity, a semen stain

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[12] Penelope B., 104 Wn.2d at 646-47; Miller v. State, 517 N.E.2d 64, 69 (Ind. 1987); State v. Petry, 524 N.E.2d 1293, 1300 (Ind. Ct. App. 1988).

[13] Penelope B., 104 Wn. 2d at 647; Miller, 517 N.E.2d at 69; Petry, 524 N.E.2d at 1300.

[14] Jones, 112 Wn.2d at 495; Hunt, 48 Wn. App. at 848; State v. John Doe, 105 Wn.2d 889, 897, 719 P.2d 554 (1986) (Utter, J., concurring).

on a child's blanket, a child's nightmares and psychological evidence.[15]

There is no disagreement as to the fact that the trial court in this case did not separately determine that corroborative evidence of abuse existed before ruling that the hearsay statements were admissible. The State does, however, dispute the Court of Appeals conclusion that a search of the entire record revealed insufficient corroboration of R.T.'s abuse to render her hearsay statements admissible. The State argues that several categories of evidence provided sufficient corroboration of R.T.'s abuse. These categories, along with a description of the relevant testimony[16], are analyzed

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[15] See Jones, 112 Wn.2d at 495-96; see also State v. Allen, 157 Ariz. 165, 177, 755 P.2d 1153 (1988).

[16] These descriptions include some testimony offered only during evidentiary hearings conducted in the jury's absence, as well as evidence ruled inadmissible,

separately in the pages of this opinion that follow.

PARALLEL DISCLOSURES BY THE CHILDREN

On October 2, 1985, 3-year-old B.A. walked out of a day-care center bathroom with her dress tucked in her tights. The center's teacher, Lisa Conradi, untucked the dress and told B.A. to keep her private parts covered. When B.A. appeared confused, Conradi explained that "private parts" means the areas covered by her bathing suit. B.A. pointed to her chest and crotch area. Conradi then added that no one should look at or touch B.A.'s private parts, whereupon B.A. said, "uh-huh, Mommy and Daddy do." When asked "What do Mommy and Daddy do?", B.A. replied, "Mommy spits on me." Conradi asked where, and B.A. pointed to her crotch. At this

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since we may consider all evidence in the record in assessing corroboration of claimed abuse. See Jones, 493; ER 104(a).

point, Conradi gave B.A. a book and took the rest of the children downstairs. When Conradi returned, she asked B.A. if her parents did anything else to her private parts. B.A. said she spits on Mommy in her private parts and that Daddy "puts his potty in me and it hurts real bad." Conradi explained that a man's potty was a penis. The two them walked around the room. B.A. played peekaboo from behind a door with Conradi several times, and said, "My daddy plays peekaboo with me." She also said, "My daddy puts his penis in my mouth and icky milk comes out." When asked who else played this game, B.A. said Josh does. B.A. also said they played the games in the bedroom with their clothes off.

When Cindy Bratvold, the day-care owner, returned to the center a short while later, Conradi told her about B.A.'s statements. Bratvold then called Child Protective

Services (CPS). After calling CPS, Bratvold then called asked B.A. whether her close friend R.T., who attended the same day-care center, played games with B.A.'s parents. B.A. said "yes."

Two CPS caseworkers interviewed B.A. that day. B.A. would not answer questions they posed, but when Conradi asked in their presence if her mother spit on her or put her mouth on B.A.'s private parts, the child nodded and said "yes." The interview ended when the defendant Kathleen Swan came to take her daughter B.A. home. The CPS caseworkers then decided to interview R.T. and B.A. on October 4, when both girls were scheduled to be at the day-care center.

R.T. came to the center the following day, October 3, but B.A. did not. Bratvold took R.T. upstairs and began to talk to her. Bratvold started by asking R.T. if she liked certain people, including "B.A.'s

mommy." R.T. liked the people listed and "kind of" liked Kathy Swan. When asked what she meant, R.T. said "she makes us play funny games." These games included exercise games and ring around the rosy in the nude and falling on the bed. "Then we kiss Kathy's boobies and we lick her potty, and she does that to us, too." R.T. also said that "Kathy puts - one time Kathy put something in my potty and made me bleed, and she cleaned it up and told me not to say anything."

R.T. then said she played games with "Uncle Bill" (the defendant William Swan). She said that Uncle Bill's favorite game was the happy birthday game. "And that's where he puts his peepee in my mouth and shakes it around, and them he says, 'Here is your happy birthday present,' and something icky gets in my mouth." R.T. also said that the Swans put candles and

marbles in her "peepee." She added that another man, John or Josh, played the games.

The next day, a CPS caseworker came to the Bratvold day-care center to talk to the two girls. An initial attempt to interview them together proved unsuccessful, so the caseworker talked to the girls separately in Bratvold's presence. R.T. told the caseworker that she played "with a game of marbles" at the Swans' home. She then added, "Bill plays without his clothes on. Bill touches my potty with his fingers." When asked what a "potty" was, R.T. said it was a "peepee hole." R.T. then said, "Kathy put some marbles in my bottom." When asked where her bottom was she said "peepee hole" and pointed to the vaginal area of an anatomically correct doll that the caseworker had brought. R.T. then added, "I am afraid...Kathy touches my

potty. Blood was on my bottom. Kathy put something in my peepee hole. It hurt." She said there was blood "down there" and pointed to her crotch. She also said that she touched Kathy's "potty and boobies" and put her mouth on them. R.T. then said that B.A. was present, and added, "I am too afraid for it. I just hurt, she poked a marble in it, she just put a marble in it, in my potty." What happened? "Kathy fixed it."

Bratvold then asked R.T. about the happy birthday games. R.T. said, "Bill and Kathy put a candle in my potty and played happy birthday. Bill put marbles in my potty to make it better. Stuff comes out of his peepee." When asked if the "stuff" was like milk, water, or blood, R.T. replied, "Like milk." She added that "Bill gives me a happy birthday present, gives me one in the bottom." When asked if she liked

Bill, R.T. said, "He is mean, I don't like him, he hurts, he puts his peepee -------." R.T. pointed to the vagina on the doll when asked where Bill puts his peepee on her. "It hurt." R.T. added that B.A. played the marble and happy birthday games with the defendants.

The CPS caseworker then interviewed B.A. When asked if Mommy spits on her potty, B.A. replied, "Yes." When asked where Daddy puts his peepee, she said, "On my potty". When asked how it felt, she answered, "It hurts". B.A. said R.T. was present when these things happened, and she said that she played happy birthday and marble games with her mother and father, but she would not describe the games.

After the interviews, the police were called and the children were taken into protective custody. B.A. was placed in a foster home while R.T. was returned to her

parents and continued to attend Bratvold's day-care center. Two months later, R.T. told Bratvold she wanted to tell her something. "See my finger? I have a burn. I had a burn. . . When Bill and Kathy lit the candle in my potty and I tried to grab it out, my finger got burned, and then I bumped my head on the counter when they made me lay on the counter." On October 17, 1985, after the alleged abuse came to light, R.T. spontaneously told her father that "Bill and Kathy are bad" because they put marbles in her bottom.

B.A.'s foster mother testified that while drying B.A. off after a bath, B.A. told her that her mommy and daddy put marbles in her potty. The foster mother asked her son for some toy marbles and asked B.A. if they were the type of marbles Daddy put in her potty. B.A. laughed and said no. When asked what kind of marbles

Daddy used, B.A. pointed to her crotch. The foster mother then asked if the marbles were on Daddy's potty, and B.A. pointed to her crotch and said, "Yes, and a snake full of marbles." The foster mother also testified that B.A. had mentioned marbles on other occasions, and once had said that her daddy put marbles and other things inside her potty and then started to cry as she said this. The foster mother testified further that B.A. once brought up the subject of birthday candles in her potty.

Having outlined the parallel disclosures made by the children, we now turn to an analysis thereof to determine whether, as the State argues, these disclosures are corroborative evidence of the alleged abuse.

B.A. and R.T. did not have contact with each other on October 2 or 3, the days that

they talked to the day-care workers. On October they sat together but briefly before their separate interviews by the CPS caseworker.

Summarizing the similarities between the statements of these two 3-year-old children, we find the following. B.A. said that her daddy put "his potty in me", and R.T. said that he put his "peepee" in her. B.A. said that Daddy put his penis in her mouth and icky milk came out; R.T. said Uncle Bill put his potty in her mouth and something icky, like milk, came out. B.A. said that she and her parents played games in the bedroom without clothes on; R.T. said that they played ring around the rosy in the nude, that Uncle Bill played without his clothes on, and that they fell on the bed after their games. B.A. said Josh also played the games, while R.T. said John or Josh played. B.A. said that her parents

put marbles and birthday candles in her potty; R.T. said that the Swans put candles and marbles in her peepee and her bottom.

The Court of Appeals did not discuss these statements in detail before dismissing their corroborative value. The Court of Appeals held, "Certainly, to some degree, R.T.'s statements corroborate those of B.A. and to some degree B.A.'s statements corroborate those of R.T. However, under the circumstances of this case we do not believe that this corroborative evidence is, standing alone, sufficient to lead to the requisite 'logical and reasonable inference.'"

Recent cases from other jurisdictions have discussed "cross-corroboration" in greater detail and have used it to support the admission into evidence of child victims' hearsay statements. The statutory guidelines in those other jurisdictions,

however, are not precisely the same as those set forth in Washington's child victim hearsay statute, RCW 9A.44.120.

The New York Court of Appeals found that three brothers' hearsay statements of abuse cross-corroborated each other in the second of two child protective proceedings reported in In re Nicole V., 71 N.Y.2d 112, 518 N.E. 2d 914, 524 N.Y.S.2d 19 (1987). The action underlying the second proceeding was governed by a civil statute providing that out-of-court statements may be corroborated by "'[a]ny other evidence tending to support'" their reliability.[17] Applying what it referred to as this "broad flexible rule", the court concluded that the statements of each brother tended to support the other's statements and, viewed together, gave sufficient indicia of

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[17] In re Nicole V., 71 N.Y.2d 112, 118, 518 N.E.2d 914, 524 N.Y.S.2d 19 (1987) (citing Family Court Act § 1046(a)(vi)).

reliability to each victim's out-of-court statements.[18] As the court there declared:

> Specifically, both Francis and David described an incident in which respondent had David put a "stick" into respondent's vagina while Francis looked on. Additionally, both Samuel and Francis described separate incidents where respondent came into each child's bedroom in the middle of the night and had sexual relations, hand to penis contact and mouth to penis contact, with each child after which she threatened each child not to tell anyone about the incidents. Because each child had consistently and independently described these particularly detailed sexual acts, the reliability of the victim's out-of-court statements could be weighed by comparing them.

In re Nicole V., 71 N.Y.2d at 124. Thus, in this New York case the courts below properly found each victim's hearsay statements were sufficiently corroborated by the statements of the other victims to establish a prima facie case of sexual abuse.[19]

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[18] Nicole V., 71 N.Y.2d at 124.

[19] Nicole V., 71 N.Y.2d at 124.

As noted earlier, our statute (RCW 9A.44.120) requires corroboration of the act of sexual abuse, and thus is less "broad and flexible" than the New York statute applied above. B.A. and R.T. did, however, consistently and independently describe similar sexual acts in varying degrees of detail. Using the logic and reasoning implicit in In re Nicole V., the many parallels between the 3-year-old girls' statement in this case supply a reasonable inference that the abuse described by these young children did occur.

The Alaska Court of Appeals also used cross-corroboration to allow admission of two child victims' hearsay statements into evidence in Murray v. State, 770 P.2d 1131 (Alaska Ct. App. 1989) and Clifton v. State, 758 P.2d 1279 (Alaska Ct. App. 1988). The Alaska statute applicable to

both cases required additional evidence to corroborate a child victim's hearsay statements before they could be admitted into evidence before a grand jury.[20] In Murray, a 5-year old and her 9-year-old neighbor told their parents and a police officer that a family friend had sexually abused them. They described in detail sexual acts that they were subjected to and which they had witnessed being performed on each other. Despite lack of a confession or any medical or physical evidence, the court found the girls' charges corroborated in large part by each other's claims. The court cited Clifton in observing that "one child's claims of sexual abuse may corroborate another child's claim against the same

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[20]Alaska Stat. § 12.40.110.

individual."[21]

In the other Alaska case, Clifton, an 11-year old boy and his 13-year-old sister told a social worker that their stepfather had sexually abused them, and then recanted their statements. In their original statements, the boy had described in detail ongoing acts of oral sex, while his sister said that the defendant had touched her sexually four or five times. At trial, the youngsters again denied their earlier charges, but admitted making earlier accusations of sexual abuse. The court concluded there that the original statements corroborated each other and were admissible as evidence.[22]

In the case before us, as in Murray, the girls described in some detail (R.T. more

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[21] Murray v. State, 770 P.2d 1131, 1138 (Alaska Ct. App. 1989).

[22] Clifton v. State, 758 P.2d 1279, 1282 (Alaska Ct. App. 1988).

than B.A.) similar sexual acts and said that the other was present. The fact that the children in this case reported each other's presences, coupled with their parallel references to certain sexual practices, lends support to their claims of abuse. In Clifton, the children recanted their claims, while in Murray and the case at bar the children repeated the same basic stories of abuse. Indeed, weeks and even months after their allegations first came to light, both R.T. and B.A. independently indicated that the defendants had inserted marbles and birthday candles into their vaginas. Moreover, these consistent claims came from 3-year-olds, as opposed to the 5- to 13-year-olds involved in Clifton and Murray. We agree with the State that the likelihood that 3-year-old girls would fabricate this same story simultaneously, or that the girls

would conspire to tell a continuing tale of sexual abuse about the parents of one of them, is remote. While Clifton and Murray required only corroboration of the statements, their acceptance of two victims' hearsay as mutually corroborative strengthens the State's contention in this case that the statements of R.T. and B.A. are corroborative of each other's abuse.

Tied to these parallel disclosures is the State's argument that the girls' eyewitness accounts of each other's abuse corroborates their abuse. Each girl simply said, however, that the other was present; neither described in detail what was seen to happen to the other. This is in contrast with Murray, where the 9-year-old said that she saw the defendant licking her 5-year-old friend's vaginal and breast areas and is also in contrast with Nicole V., where the two boys described a specific

act of abuse in which one participated.[23] Here, the bare statement that the other girl also played the games provides little corroboration of the alleged abuse.

PRECOCIOUS SEXUAL KNOWLEDGE

Related to the girls' disclosures is the State's claim that their statements indicate precocious sexual knowledge that the girls could have learned only as the result of being abused.

Such knowledge was demonstrated when a child victim described the act of urolagnia which she claimed that the defendant made her perform in State v. Jones, 112 Wn.2d 488, 491, 772 P.2d 496 (1989). There we found such "precocious knowledge" corroborative of the child's claim of abuse. We there said that the victim "has

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[23] See Murray, 770 P.2d at 1133; Nicole v., 71 N.Y.2d at 124.

described and demonstrated with particularity acts of sexual gratification that even the most imaginative adult might not conceive in a vacuum of personal experience."[24] Since the record revealed no other way in which the victim could have learned of such acts, her knowledge was held in Jones to be corroborative evidence of abuse.[25]

The defense argues here that day-care workers Conradi and Bratvold were predisposed to find child abuse and tainted the girls' memories by asking them questions about what B.A. had said before the CPS interviews began. It is true that Conradi did ask a few such questions which the girls did not answer. The key allegations by both girls, however, were

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[24] State v. Jones, 112 Wn.2d 488, 497, 772 P.2d 496 (1989).

[25] Jones, 112 Wn.2d at 497.

made separately, spontaneously and repeatedly. While B.A. answered only leading questions posed by the CPS caseworker, she spoke freely to Conradi as well as to her foster mother. It is our view that this record does not support defendants' contention that witnesses Conradi and Bratvold supplied the children with the sexual knowledge they revealed.

A 5-year-old child's precocious sexual knowledge was held corroborative of her statements of abuse in the Murray case discussed above. In Murray, the child gave a detailed description of episodes of vaginal and anal penetration and fellatio, and spoke of a "milky substance" coming out of the defendant's penis.[26] The court placed "great emphasis" on the child's ability to describe the sexual contact with specificity:

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[26]Murray, 770 P.2d at 1133-34.

> Given the child's age (five years at the time of the assault), we concluded that the maturity and accuracy of the detail in her description of the offense provided intrinsic assurance of the reliability of her statement.

Murray, 770 P.2d at 1138.

Another child's description of ejaculation was also held to have corroborated her hearsay statements in the first proceeding reported in In re Nicole V., 71 N.Y.2d 112, 518 N.E.2d 914, 524 N.Y.S.2d 19 (1987). In this proceeding, an expert testified that the victim's knowledge of sexual activity far beyond the norm for 3 1/2-year-olds was a classic symptom of child abuse. The court observed that there was no other basis in reality for Nicole's statement of "white glue" or "paste" coming from her father's genital area or the placing of his penis in her vagina.[27]

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[27] In re Nicole V., 71 N.Y.2d 112, 121-22, 518 N.E 2d 914, 524 N.Y.S.2d 19 (1987).

In the present case, both victims described episodes of fellatio and ejaculation, as well as intercourse and possibly cunnilingus. While these acts are not as unusual as those described by the child victim in Jones, their accurate description by 3-year-old children indicates such precocious sexual knowledge that we consider it corroborative of abuse.

B.A.'s MASTURBATORY BEHAVIOR

Witness Bratvold testified that B.A. masturbated constantly during her last 4 to 5 months at the day-care center, and one of Bratvold's employees testifies that she had to repeatedly tell B.A. to keep her hands out of her pants. This behavior was not referred to by the Court of Appeals as corroborative evidence of abuse.

While the State argues here that such masturbation by this 3-year-old child demonstrates precocious sexual knowledge,

the State deliberately did not offer testimony of its significance at trial. In making her offer of proof regarding a doctor's testimony about B.A.'s emotional reactions to two medical examinations, the deputy prosecuting attorney advised the trial court as follow:

> Your honor, at this point, the State, and it hopes to alleviate a lot of argument, is not asking Dr. Jenny to testify regarding masturbatory behavior, whether it's excessive on the part of a three-year-old or the sexual acting-out, the State is leaving that alone. What we are asking her to testify at this point is the significance, if any, of this behavior during the exam.

The defense urges this court to consider expert commentary and cites a pediatric guide stating the "'[o]ccasional masturbation is a normal behavior of many infants and preschoolers.'"[28] We note that another expert sees frequent masturbation as a common reaction to sexual

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[28]Response to Petition for Review, at 14.

victimization.[29]

Even if such masturbatory behavior were to be viewed as partially corroborative of B.A.'s abuse, we fail to see how it might corroborate R.T.'s abuse. Arguably, it could perhaps be reasoned that if B.A. masturbated because she was abused, and if R.T. was present when B.A. was abused, then R.T. probably was abused, too. It is most questionable, however, that this could reasonably be considered as corroborative evidence of R.T.'s abuse.

THE UNUSUAL "GREETING" OF B.A. AND R.T.

This "greeting," performed more than once at the day-care center, consisted of the girls running up to each other, grabbing their crotches, and giggling. As

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[29]American Bar Ass'n, The Corroboration of Sexual Victimization of Children, Child Sexual Abuse and the Law 103, at 109 (5th ed. 1984), cited in Note, The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations, 98 Harv. L. Rev. 806, 821 n. 99 (1985).

stated above, the State intentionally did not offer expert testimony on the meaning of this "sexual acting out," presumably to avoid protracted argument. The Court of Appeals held that without such expert testimony, evidence of the "greeting" was useless as corroboration.

A child's sexualized behavior at her day-care facility was seen as corroborative by the court despite an expert's uncertainty in State v. Hunt, 48 Wn. App. 840, 741 P.2d 566, review denied, 109 Wn.2d 1014 (1987). Day-care employees testified in that case that the child took naps with two blankets bunched under her crotch and thighs to elevate her bottom, and then tucked her blankets between her legs and rocked herself to sleep. Employees also observed the child lying face down with her underpants down and a little boy rubbing

her buttocks.[30] A psychologist testified that such conduct could indicate that the child had been exposed to adult sexuality and sexual abuse.[31] The trial court found the expert's testimony "very indefinite" but in its own judgment concluded that the child's behavior at the day-care facility met the corroboration requirement of RCW 9A.44.120.[32] The Court of Appeals also found the expert's assessment somewhat equivocal, but proceeded to find ample corroboration based on the child's behavior and other evidence in the case.[33]

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[30] State v. Hunt, 48 Wn. App. 840, 841, 741 P.2d 566, review denied, 109 Wn.2d 1014 (1987).

[31] Hunt, 48 Wn. App. at 842.

[32] Hunt, 48 Wn. App. at 842-43.

[33] Hunt, 48 Wn. App. at 850.

Two recent Minnesota cases similarly considered abnormal and sexualized behavior as corroborative of children's hearsay statements regarding abuse. In M.N.D. v. B.M.D., 356 N.W.2d 813, 816 (Minn. Ct. App. 1984), a psychologist testified that a child's behavior in inserting objects into her rectum was consistent with sexual abuse. In D.A.H. v. G.A.H., 371 N.W.2d 1, 4 (Minn. Ct. App. 1985), the court found corroborative the child's fear of men as well as her behavior in grabbing at men's genital areas and having nightmares. In this Minnesota case, there was no mention of expert interpretation of such behavior.

While experts may not be needed to label certain behavior as symptomatic of abuse, it would seem that the less obviously sexual the behavior, the more experts might be able to assist in interpreting that behavior. The "greeting" employed by B.A.

and R.T. would not appear to be strikingly abnormal, sexualized behavior. Without expert interpretation, it may be viewed as sexually oriented, but not as strongly corroborative of either girl's abuse.

R.T.'s BEHAVIOR WITH AM ANATOMICALLY CORRECT DOLL

When the CPS caseworker interviewed R.T., she brought along an anatomically correct female doll. R.T.'s behavior with the doll consisted of pointing to the vagina of the doll when she said "peepee hole," and again pointing to the vagina of the doll when the caseworker asked her where Bill put his "peepee" on her. The Court of Appeals held that since there was no expert testimony in this case regarding behavioral characteristics that evince sexual abuse, there was nothing in the record to support the conclusion that R.T.'s behavior with the doll demonstrated unusual sexual awareness or constituted

corroboration of abuse.

Here again, the question of whether expert testimony was necessary is raised. In Hunt, our Court of Appeals observed that much of the child victim's play with anatomically correct dolls was a combination of "'nonassertive verbal and nonverbal conduct.'"[34] Testimony regarding such play was thus not hearsay and provided additional corroboration that the child had been abused.[35] In Hunt, the testimony regarding the child's play was unaccompanied by expert testimony. The play consisted of the child undressing a male doll and grabbing its penis, undressing a female doll, and placing the penis of the male doll between the female

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[34]Hunt, 48 Wn. App. at 850 (citing In re Penelope B., 104 Wn.2d 643, 655, 709 P.2d 1185 (1985)).

[35]Hunt, 48 Wn. App. at 850; Penelope B., 104 Wn.2d at 654-55.

doll's legs.[36] Testimony regarding play with anatomically correct dolls also was viewed as corroborative without the benefit of expert testimony in State v. Jones, 112 Wn.2d 488, 772 P.2d 496 (1989). In Jones, the play demonstrated the abusive act of urolagnia.[37]

In two cases from other jurisdictions, a child victim's play with anatomically correct dolls also was seen as corroborative without the aid of expert testimony. In Murray, the child put the penis of a male doll between the legs of a female doll, in its mouth, and in its rectal area.[38] Another child demonstrated with dolls that her father had touched her

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[36] Hunt, 48 Wn. App. at 842.

[37] State v. Jones, 112 Wn.2d 488, 492, 772 P.2d 496 (1989).

[38] Murray v. State, 770 P.2d 1131, 1134 (Alaska Ct. App. 1989).

genital area in In re Dutchess Cy. Dep't of Social Servs. ex rel. Kerri K., 135 A.D.2d 631, 633,522 N.Y.S.2d 210 (1987).

It thus appears to us that R.T.'s play may be considered on its own merits, without the benefit of expert interpretation. Her play with the female doll was not nearly as explicit as the 2-doll play described in Jones, Hunt, and Murray, but is equivalent to that described in Kerri K. As such, it serves as at least some corroboration of R.T.'s abuse.

R.T.'s COMPLAINTS OF PAIN

R.T.'s father testified that during the summer of 1985, and up to the beginning of September 1985, R.T. occasionally complained that her bottom was very sore while doubling over and putting her hands on her crotch. The Court of APpeals rejected this evidence as having any significance on the basis that it was

medically unsubstantiated and because the complaints "occurred months after the abuse allegedly occurred and ceased 1 month before the allegations came to light."

We agree that it is clear that R.T.'s complaints ceased 1 month before the allegations came to light in early October. Less clear, however, is the timing of the alleged abuse. R.T.'s father testified that the defendants babysat R.T. a couple of times a month during 1985. The only time he could recall the defendant William Swan being there was when R.T. spent the night with the defendants in January 1985. The defendant Kathy Swan testified that she babysat R.T. only five or six time between January and October 1985. Both defendants testified that the only time R.T. was with William Swan in her parents' absence was on the January night she spent with the defendants.

If the defendants' testimony is believed, R.T. could have been sexually assaulted by William Swan only on that January night, well before her complaints of pain began. She had more chances at a later time to be assaulted by Kathy Swan, however, according to both her father and Kathy Swan. The information which was filed in this case charged the defendants with raping the girls between January and October 1985. Thus, the timing of the alleged abuse does not appear to us to be as certain as the Court of Appeals seemed to indicate. It is true that the complaints were not medically substantiated, but according to at least one authority, psychosomatic complaints about pain in the genitals or buttocks may

be a symptom of sexual victimization.[39] We thus conclude that R.T.'s complaints did provide some degree of corroboration of sexual abuse.

PHYSICAL AND EMOTIONAL CORROBORATION OF B.A.'s ABUSE

This category of evidence includes testimony regarding B.A.'s two medical examinations and the views of an expert witness regarding those examinations.

Thomas Ritter, a nurse practitioner, examined B.A. on October 7, 1985. He was asked to check out her coughing and also to examine her for signs of sexual abuse. B.A. became very distraught when Ritter told her he wanted to do a genital examination. She clung to her foster mother and said repeatedly, "Please don't hurt me." When she finally agreed to be

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[39] The Corroboration of Sexual Victimization of Children, American Bar Ass'n, Child Sexual Abuse and the Law 103, at 109 (5th ed. 1984).

examined, she wouldn't let Ritter completely remove her underpants. She then assumed a position that Ritter said he had never seen in his 4 years of practice with children. She lay on her back, drew her knees up to her chest, and put her arms around her knees, thus leaving her genitalia and buttocks exposed. She was crying at the time and intermittently attempted to guard her genitalia by putting her hand between her legs. Ritter also found that the inside of the labia contained blood vessels that were more dilated than usual, and saw that the area around the introitus (the opening of the vagina) was reddened. He estimated the size of the introitus to be 1 to 1.2 centimeters. During the examination, Ritter did not check on whether a hymen was present, but he was able to see into B.A.'s vagina. After the examination, B.A. asked

Ritter two or three times not to take any pictures of her, and was overall very distraught.

On October 9, 1985, the Swans' family physician, Dr. Lawrence Parris, examined B.A. was very fearful and didn't want her underpants pulled down. Dr. Parris observed that the vaginal introitus was slightly red, and noticed a slight discharge. He did not note whether the hymen was intact. He found no definite evidence of physical injury, but recommended that B.A. be evaluated at a sexual assault center because of her fearfulness.

Dr. Carol Jenny, Medical Director of the Sexual Assault Center at Harborview Medical Center, was accepted by the court as an expert on sexual abuse of children, and testified about her observations regarding the Ritter and Parris findings. Dr. Jenny

testified that an introitus of 1 to 1.2 centimeters is abnormally large for a 3-year-old (the normal size is .4 cm). She noted that Ritter's ability to see the tissue inside the vagina indicated that he could see through out the hymenal opening, even though neither Ritter nor Dr. Parris specifically recorded the presence or absence of a hymen. She also observed that it is unusual to find a vaginal discharge in a child, and such a discharge might result from infection caused by sexually transmitted disease. In assessing her testimony, the Court of Appeals considered Dr. Jenny's opinion, which had been ruled inadmissible by the trial court,[40] that B.A.'s fearfulness during the examination was probably a sign of sexual abuse.

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[40] See Jones, 112 Wn.2d at 493; ER 104(a).

There was no medical evidence to document R.T.'s claims of abuse. A physician examined her on October 5, 1985 and found no signs of physical trauma.

Medical evidence similar to that regarding B.A. was considered corroborative of abuse in State v. Gitchel, 41 Wn. App. 820, 706 P.2d 1091, review denied, 105 Wn.2d 1003 (1985). Such evidence in Gitchel included a doctor's finding of partial vaginal penetration and the child's inappropriate behavior during the medical examination.[41] The New York Supreme Court also concluded that redness in a child's genital area partially corroborated her allegations of abuse in Kerri K., 135 A.D.2d at 633.

We thus observe in this case, as did the Court of Appeals, that the medical evidence

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[41] State v. Gitchel, 41 Wn. App. 820, 828, 706 P.2d 1091, review denied, 105 Wn.2d 1003 (1985).

regarding B.A. is sufficient to permit a logical and reasonable inference that she was abused. Whether that evidence corroborates R.T.'s abuse is another matter. Strictly speaking, B.A.'s physical and emotional status during the examinations does not establish that R.T. was assaulted. B.A.'s physical and emotional conditions do lend at least some measure of support, however, to R.T.'s statements that B.A. played the games with her parents and, accordingly, that R.T. was present and was abused as well.

IN CONCLUSION AS TO THE CORROBORATION ISSUE

The strongest corroboration of R.T.'s abuse lies in the parallel disclosures of abuse that she and B.A. made, and in the precocious sexual knowledge that the disclosures reveal. Somewhat corroborative is her play with the anatomically correct doll and her complaints of pain. While the

girls' unusual greeting demonstrates some appreciation of sexuality, we do not perceive it as strongly corroborative of the claimed abuse. Even less corroborative of R.T.'s abuse, standing alone, is B.A.'s masturbatory conduct and the physical and emotional evidence of her abuse. Viewed together, however, the corroborative value of these pieces of evidence is strengthened. As we declared in State v. Jones, 112 Wn.2d 488, 772 P.2d 496 (1989), "the determination of corroboration under RCW 9A.44.120 [the child victim hearsay statute] requires an evaluation of the particular circumstances that obtain in each case."[42] It is more than merely arguable that the contemporaneous circumstances of this case--the girls' parallel disclosures, sexual knowledge and greeting, R.T.'s complaints of pain and

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[42] Jones, 112 Wn. 2d at 498.

play with the doll, B.A.'s masturbation and the medical and emotional evidence of her abuse--lead to a reasonable inference that both girls were sexually abused. As we also made clear in Jones, the essential purposes of the child victim hearsay statute "should not be defeated by a stubborn insistence on corroboration that is impossible to obtain."[43] While there is no direct evidence of abuse in this case, the various items of indirect evidence stemming from the words and behavior of these 3-year-old children together constitute sufficient corroboration of abuse to render each child's hearsay statements admissible in evidence.

ISSUE TWO.

CONCLUSION. The well-established criteria for granting a new trial on the

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[43] Jones, 112 Wn.2d at 496.

basis of newly discovered evidence were not met in this case; the trial court did not abuse its discretion by denying the defendants' motion for a new trial on that basis.

A new trial will not be granted on the ground of newly discovered evidence unless the moving party demonstrates that the evidence (1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching.[44] The absence of any one of these five factors justifies denial of a new trial.[45] Furthermore, the granting of a new trial

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[44] State v. Williams, 96 Wn.2d 215, 222-23, 634 P.2d 868 (1981); State v. Franks, 74 Wn.2d 413, 418, 445 P.2d 200 (1968).

[45] Williams, 96 Wn.2d at 223; see also Franks, 74 Wn.2d at 418.

for newly discovered evidence rests within the sound discretion of the trial court, and a denial will not be reversed except for an abuse of that discretion.[46]

After the defendants in this case were found guilty by a jury, they filed a motion for a new trial. This motion was based on three categories of newly discovered evidence, two of which dealt with defendants' claim that Lisa Conradi was "obsessed" with child abuse. One evidentiary category consisted of statements made by Conradi, the teacher at R.T.'s and B.A.'s day-care center, to a reporter who was also, apparently unbeknownst to Conradi, an investigator for the defendants. These statements described

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[46] State v. Wilson, 71 Wn.2d 895, 899, 431, P.2d 221 (1967); State v. Hobbs, 13 Wn. App. 866, 869, 538 P.2d 838, review denied, 85 Wn.2d 1019 (1975); see also State v. Barry, 25 Wn. App. 751, 757, 611 P.2d 1262 (1980).

Conradi's own sexual abuse as a child and her previous problems with drugs and alcohol. The second category consisted of prior false reports of child abuse allegedly made by Conradi to CPS. The third category was defense counsel's discovery that a boy named Josh attended the same day-care center as R.T. and B.A., the girls having each testified that a "John" or "Josh" played sexual games with them and B.A.'s parents.

The trial court denied the motion for a new trial, concluding that the presence of a Josh in the day-care center was something that was clearly discoverable in advance of trial. With regard to Conradi, the court described her statement to the reporter as "typical puffery." More importantly, the court found no facts in the statement that differed from those to which Conradi testified at trial. The

trial court observed further that "there is no new evidence in the statement with respect to her interest or concerns which Defense now characterizes as obsession [with] child abuse." The witness Conradi's problems were not properly characterized as newly discovered evidence. "Conradi was investigated and investigated before trial. There is no showing before the Court that this information was not available." The trial court also found no evidence to support the claim that Conradi previously made false reports of child abuse to CPS.

In its ruling, the trial court reminded counsel of the requirements for granting a new trial:

> The Court is mindful that the proffered evidence should be such that results would probably change. It is not correct that the statements of Conradi were the State's case. The State Had overwhelming evidence, her medical evidence, behavior evidence, and statements not only to Conradi but consistent statements to other--CPS workers, [the foster mother], I believe to Bratvold. I believe due diligence

> would have discovered the evidence which is characterised [sic] here as new evidence. Most of it is merely impeaching. The requirements, therefore, for the granting of a new trial are not met.

We agree with the trial court that the new evidence regarding Conradi was merely impeaching. At trial Conradi testified directly and on cross examination about classes in child abuse that she took and about the abuse of her two sons. On cross, she was asked about a prior statement that child abuse was everywhere, and she replied that "[i]t's just about in every state, every city, every public school." During closing argument, the defense referred to the abuse of Conradi's children as well as her expectations of child abuse allegedly fostered in part by Cindy Bratvold, the day-care owner. Defense counsel argued that Conradi brought her educational and personal experiences with her as well as "her idea that sexual abuse is everywhere,

and it's as prevalent as behavior problems with children." Thus, the claim that Conradi was "obsessed" with child abuse, to use defendants' argumentative phraseology, was clearly before the jury at trial, and any new evidence in that regard was at most cumulative impeaching evidence.

We also agree with the trial court's conclusion that the claimed "new evidence" was discoverable before trial. No contention has been made that the names of the children at the day-care center could not have been discovered before trial had anyone sought to check. The defense contends on appeal that the State knew of witness Conradi's prior sexual abuse before trial, but there is no evidence in the record to support this contention (This same contention is again raised in connection with Issue Twelve). No showing

was made before the trial court that the information about Conradi's own abuse was not available before trial.

Moreover, the trial court's statement that this newly discovered evidence would not have changed the outcome of the trial is also sustainable. The identity of Josh as a playmate would have challenged only one relatively minor detail in the girls' statements describing their abuse, and while the evidence regarding Conradi arguably could have added some weight to the defense efforts to impeach her credibility, it would not have affected the rest of the State's case, which included several other witnesses and several repetitions of the same type of statements by the two children disclosed in Conradi's testimony.

Since the "newly discovered" evidence would probably not have changed the outcome

of the trial, could have been discovered before trial, and was both cumulative and impeaching, the trial court did not abuse its discretion in denying the motion for a new trial. In sum, we conclude here, as this court has previously concluded, that

> each now trial inevitably leaves new avenues for investigating the facts anew. Hardly a case can be supposed but what, by diligent search, some additional evidence will be found that would, if offered at trial, have been admissible on one theory or another. The mere existence of such evidence does not alone justify the granting of a new trial.

State v. Williams, 96 Wn.2d 215, 224, 634 P.2d 868 (1981).

ISSUE THREE.

CONCLUSION. The trial court did not abuse its discretion by finding that R.T. was incompetent to be a witness in this case.

Under the child victim hearsay statute, RCW 9A.44.120, a child's description of sexual abuse is admissible as evidence if

the statements are reliable and if the child either testifies or is unavailable as a witness. In the case before us, both B.A. and R.T. were unavailable because the trial court found them both incompetent to testify. The defense challenges only the conclusion that one of the children, R.T., was incompetent.

This court has declared that the test of the competency of a young child as a witness consists of the following: (1) an understanding of the obligation to speak the truth on the witness stand; (2) the mental capacity at the time of the occurrence concerning which he or she is to testify, to receive an accurate impression of it; (3) a memory sufficient to retain an independent recollection of the occurrence; (4) the capacity to express in words his or her memory of the occurrence; and (5) the capacity to

understand simple questions about it.[47]

The determination of competency rests

> primarily with the trial judge who sees the witness, notices his manner, and considers his capacity and intelligence. These are matters that are not reflected in the written record for appellate review. Their determination lies within the sound discretion of the trial judge and will not be disturbed on appeal in the absence of proof of a manifest abuse of discretion.

State v. Allen, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967); see also

State v. Griffith, 45 Wn. App. 728, 733, 727 P.2d 247 (1986).

At the competency hearing, defense counsel asked R.T. no questions and made no argument regarding her competency despite being invited to do so. Nor did the defense object to her being found incompetent to testify. The defense now contends, however, that the questioning by the court and the prosecutor was

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[47] State v. Allen, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967); State v. Tuffree, 35 Wn. App. 243, 248, 666 P.2d 912, review denied, 100 Wn.2d 1015 (1983).

insufficient to make the necessary determination of whether the child was competent to testify. Arguably, the competency issue can be raised for the first time on appeal on the basis that the showing of unavailability is constitutionally mandated when the declarant witness, whose testimony is to be used against the defendant, is not produced.[48]

Turning to the competency hearing, R.T. said that her birthday was in "higher June." She also said she had been in the courtroom 40 times (she had never been there before) and that it was Saturday, although it was not. When asked if she recognized anyone, she pointed to defense counsel and said she had seen him 4 days

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[48] See State v. Griffith, 45 Wn. App. 728, 732 n.1, 727 P.2d 247 (1986) (citing Barber v. Page, 390 U.S. 719, 20 L. Ed. 2d 255, 88 S. Ct. 1318 (1968)).

ago, which he had not. She did not say that she recognized her father or the defendants, who also were in the courtroom. When the court asked R.T. if she knew the difference between the truth and a lie, R.T. said "not telling the truth" is telling a lie. The court then asked R.T. if it would be the truth or a lie if she was wearing a pink dress. Though her dress was pink, R.T. said it would be a lie because her dress was long. R.T. then said her dress was "blue, sort of, but it's pink." The court excused R.T. and found her incompetent to testify on the basis she did not understand the obligation to tell the truth on the witness stand and because she did not have a sufficient memory to speak truly about past events. The court added there were "several problem" with R.T.'s answers:

> I don't know whether it was the question asked, her understanding or her memory, but it was quite clear that she was not

> able to answer the questions put to her. On that basis, she is not a competent witness and the court will find her unavailable for the purposes of the statute.

The Court of Appeals reviewed the competency issue and upheld the trial court's findings of incompetency:

> B.A. refused to answer any questions and was properly determined to be incompetent to testify. While R.T. was responsive to questions, the court found R.T. incompetent on two grounds: (1) R.T.'s inability to understand the obligation to tell the truth, and (2) her ability to remember accurately and express past events. The record demonstrates that there was no abuse of discretion on the part of the trial court in finding R.T. incompetent to testify.

The defense now contends that the trial court should have asked R.T. questions about her alleged sexual abuse in determining her competency to testify. Since at the time the child was put on the witness stand she did not know the day of the week, the color of her dress, or recognize her father and the defendants,

questions about her alleged abuse were unnecessary to determine her competence to testify.

ISSUE FOUR.

CONCLUSION. The trial court did not abuse its discretion in finding both girls' hearsay statements reliable.

Before a child's hearsay statements are admissible under the child victim hearsay statute, RCW 9A.44.120, the court must find "that the time, content, and circumstances of the statement provide sufficient indicia of reliability."[49]

This court listed nine factors to be applied in determining whether a child's out-of-court statements are reliable in State v. Ryan, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984). The first five, derived from State v. Parris, 98 Wn.2d 140, 146,

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[49]RCW 9A.44.120(1); State v. John Doe, 105 Wn.2d 889, 896, 719 P.2d 554 (1986).

654 P.2d 77 (1982), include "'(1) whether there is an apparent motive to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; and (5) the timing of the declaration and the relationship between the declarant and the witness'".[50] The next four factors to be considered, derived from Dutton v. Evans, 400 U.S 74, 88-89, 27 L. Ed. 2d 213, 91 S. Ct. 210 (1970), are (1) the statement contains no express assertions about past fact; (2) cross examination could not show the declarant's lack of knowledge; (3) the possibility of the declarant's faulty recollection is remote; and (4) the circumstances surrounding the statement are

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[50] State v. Ryan, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984) (quoting State v. Parris, 98 Wn.2d 140, 146, 654 P.2d 77 (1982)).

such that there is no reason to suppose the declarant misrepresented defendant's involvement.[51]

In short, reliability does not depend on whether the child is competent to take the witness stand, but on whether the comments and circumstances surrounding the statement indicate it to be reliable.[52] The trial court is necessarily vested with considerable discretion in evaluating the indicia of reliability.[53]

The Court of Appeals concluded that the trial court's findings of reliability in this case did not constitute an abuse of discretion. As that court observed, the trial court's rulings regarding the hearsay

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[52] John Doe, 105 Wn.2d at 896; Griffith, 45 Wn. App. at 733.

[53] State v. Madison, 43 Wn. App. 754, 759, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989); see also State v. Frey, 43 Wn. App. 605, 611, 718 P.2d 846 (1986).

statements demonstrated careful consideration of the Ryan factors.

With regard to the five Parris factors listed in Ryan, the trial court observed that neither child had a motive to lie. There was testimony that B.A. had a good relationship with her parents and that R. T. enjoyed playing with B. A. at the defendants' home. With regard to the girls' general character, the testimony revealed that both children had a reputation for truthfulness. In two other child abuse cases, the courts found that the child victim's explicit descriptions of abuse made the possibility of fabrication unlikely. "'A young child is unlikely to fabricate a graphic account of sexual activity because such activity is beyond the realm of [her] experience.'"[54]

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[54] See Comment, The Sexually Abused Infant Hearsay Exception: A Constitutional Analysis, 8 J. Juv. L. 59, 67 (1984), cited in Frey 43 Wn. App. at 610; State v.

In this case, both B.A. and R.T. described in specific terms various sexual acts. The trial court also found reliability in their use of age-appropriate language and responses when describing those acts.

The trial court discussed in some detail whether the girls' statements were made spontaneously. The trial court did not accept the defense argument that Conradi's expectation of child abuse created B.A.'s claims of abuse. The trial court correctly observed that Conradi's method of questioning B.A. was open-ended and that most of B.A.'s statements were spontaneous and not even responses to questions. In another case, questioning similar to that by the witness Conradi led to the charge that the child's responses were not

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Gitchel, 41 Wn. App. 820, 827, 706 P.2d 1091, review denied, 105 Wn.2d 1003 (1985).

spontaneous.[55] This was in State v. Madison, 53 Wn. App. 754, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989), wherein a foster mother who suspected that her ward had been abused read to the child from a book on human reproduction and asked if anyone had touched her. The child then described acts of intercourse and oral sex to which she had been subjected. The Court of Appeals agreed that while the setting was not spontaneous,

> the details of the event and the identity of the defendant were not suggested and were "spontaneously" volunteered. Indeed, the foster mother testified that she was "a little stunned" by the child's accusation.

Madison, 53 Wn. App. at 759. Here, too, the witness Conradi's statement that B.A. should cover her private parts in no way suggested the details and identities that B.A. subsequently volunteered. R.T.'s

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[55] Madison, 53 Wn.App. at 759.

statements to witness Bratvold were made spontaneously, as were most of her comments to the CPS case worker. The court also accepted the reliability of her answers to direct questions from the CPS caseworker, observing,

> I don't believe it's the purpose of the indicia of reliability to eliminate from evidence all statements of children which are offered in response to questions of children. That would be, it seems to me, eliminating all possibility of an interview of a child resulting in admissible evidence.

The trial court expanded on this thought in discussing the reliability of B.A.'s responses to the caseworker, which were largely answers to leading questions:

> With respect to B.A., it seems to me the issue comes down to whether or not leading questions of a difficult child witness render the ultimate statements of the child unreliable. In this circumstance where there is other corroboration, where the same statements or similar statements were made by the child in response to open-ended questions and in a much more spontaneous context, it seems to me it does not. Quite clearly it does not.

With regard to the remaining Parris factors indicating reliability, the trial court observed that more than one person heard similar stories of abuse from the girls. The court also found that the time of the girls' declarations indicated reliability, since they were volunteered as soon as the topic was broached and since the girls made the similar statements on two consecutive days without discussing the matter between themselves. With regard to the relationship of the declarant and the witness, the court observed that witnesses Conradi and Bratvold had a relationship of trust with the girls since they taught at and operated the girls' day-care center. Both were present when the CPS caseworker interviewed the girls, indicating that people were present who were trusted by the child in each case. B.A.'s foster mother and R.T.'s father also were undoubtedly

trusted by the children.

Turning to the four Dutton factors cited in Ryan, the girls' statements contained express assertions about past fact, but as we recently noted, child hearsay statements about sexual abuse will usually contain statements about past fact.[56] That factor weighed neither in favor of reliability nor unreliability in State v. Leavitt, 111 Wn. 2d 66, 75, 758 P.2d 982 (1988). However, R.T.'s complaints of pain in her bottom describe a present state. With regard to the second Dutton factor, it is doubtful whether cross examination could have shown either child's lack of knowledge. During the competency hearing, B.A. was unable to speak, while R.T. could not respond appropriately to questions in a courtroom setting. This is similar to the situation

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[56] State v. Leavitt, 111 Wn. 2d 66, 75, 758 P.2d 982 (1988).

before the Court of Appeals when it assessed the reliability of a 30-year-old's hearsay statements in State V. Gitchel, 41 Wn. App. 820, 828, 706 P.2d 1091, review denied, 105 Wn.2d 1003 (1985): "cross examination would not have shown R's lack of knowledge under these circumstances, as R demonstrated that she did not respond to questions in a courtroom setting." As the Court of Appeals explained in Gitchel, even if R were capable of being cross-examined, the number of times she described her abuse tended to establish that R's description of what occurred was credible.[57] The same could be said here. The girls' repetition of similar and unusual details of abuse tends to establish that their descriptions were credible even absent cross examination.

The trial court did not directly address

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[57] Gitchel, 41 Wn. App. at 828.

the Dutton factor of whether the possibility of the declarant's faulty recollection is remote. In Leavitt, we observed that because the child's statements to a social worker were made soon after the event and were consistent with statements made to her aunt and mother, the possibility that she was speaking from faulty recollection was remote.[58] Here, the specific timing of any acts of abuse is unknown, but the girls did make consistent statements of abuse to five people.[59]

The final Dutton factor is whether circumstances suggest that the declarant misrepresented the defendant's involvement. Such circumstances are not apparent here.

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[58] Leavitt, 111 Wn.2d at 75.

[59] We are not unaware that R.T. at one point evidently also told the police that "Jerry" - her father - put marbles in her bottom.

It is clear that not every factor listed in Ryan needs to be satisfied before a court will find a child's hearsay statements reliable under the child victim hearsay statute, RCW 9A.44.120.[60] Moreover, it is also clear that a child's incompetency as a witness is not determinative of the reliability of his or her hearsay statements.[61] The Court of Appeals in this case found no abuse of discretion on the part of the trial court in finding the statements reliable. We uphold this finding because the reliability factors described in Ryan are substantially met.

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[60] See Leavitt, 111 Wn.2d at 75; Frey, 43 Wn. App. at 611; Doe, 105 Wn.2d at 896; Gitchel, 41 Wn. App. at 827-28.

[61] State v. John Doe, 105 Wn.2d 889, 896, 719 P.2d 554 (1986); State v. Ryan, 103 Wn.2d 165, 174, 691 P.2d 197 (1984); Frey, 43 Wn. App. at 611 n.9; State v. Griffith, 45 Wn. App. 728, 733, 727 P.2d 247 (1986).

ISSUE FIVE.

CONCLUSION. Though the State's rebuttal evidence did overlap the evidence in the State's case in chief to a degree, the trial court did not abuse its discretion by permitting the State to call the rebuttal witnesses that it did.

State v. White, 74 Wn.2d 386, 394-95, 444 P.2d 661 (1968) contains the classic statement of the scope and purpose of rebuttal evidence:

> Rebuttal evidence is admitted to enable the plaintiff to answer new matter presented by the defense. Genuine rebuttal evidence is not simply a reiteration of evidence in chief but consists of evidence offered in reply to new matters. The plaintiff, therefore, is not allowed to withhold substantial evidence supporting any of the issues which it has the burden of proving in its case in chief merely in order to present this evidence cumulatively at the end of defendant's case. Ascertaining whether the rebuttal evidence is in reply to new matters established by the defense, however, is a difficult matter at times. Frequently true rebuttal evidence will, in some degree, overlap or coalesce with the evidence in chief.

> Therefore, the question of admissibility of evidence on rebuttal rests largely on the trial court's discretion, and error in denying or allowing it can be predicated only upon a manifest abuse of that discretion.

(Citations omitted.) See also 5A K. Tegland, Wash. Prac., Evidence § 249, at 278-79 (3d ed. 1989).

Defendants assign error to the admission of hearsay testimony offered by two rebuttal witnesses. After the defendants William and Kathleen Swan testified that they had never put anything but a suppository into the vaginal or anal regions of B.A. or R.T., B.A.'s foster mother testified that B.A. told her that her parents put marbles and other things in her bottom. After a detective testified that R.T. said that Jerry put marbles in her bottom, her father (named Gerald) testified that R.T. complained to him later that "Bill and Kathy are bad" and that they

put marbles in her bottom.

The defense argues that these hearsay statements were cumulative evidence that was improperly withheld from the State's case in chief so that it could be offered when it would have the most dramatic and prejudicial effect. It is true that this rebuttal evidence did repeat some of the hearsay statements admitted in the State's case in chief. However, as the court in White declared, rebuttal evidence will frequently overlap with the evidence in chief.[62]

Moreover, we recently held that once a defendant has "opened the door" by

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[62] State v. White, 74 Wn.2d 386, 395, 444 P.2d 661 (1968); see also State v. Hightower, 36 Wn. App. 536, 548, 676, P.2d 1016, review denied, 101 Wn.2d 1013 (1984) (some degree of overlapping with pervious state expert testimony occurred, "but even at that the trial court's ruling as to what was proper rebuttal was a discretionary ruling, and we conclude there was no manifest abuse thereof").

testifying to his or her own past good behavior and denying prior acts of misconduct, the State may legitimately impeach such assertions.[63] The trial court in this case ruled that the proposed rebuttal testimony impeached assertions by defense witnesses and was admissible. The foster mother's testimony followed William Swan's assertion that he had not had sexual contact with B.A., and R. T.'s father responded to the detective's recollection of R.T.'s statement potentially implicating "Jerry". Neither piece of rebuttal evidence was substantial, and both replied to new matters raised by the defense. Accordingly, we do not consider the two witnesses' testimony inappropriate under the rules set forth in White.

Defendants make the related argument

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[63] State v. Ciskie, 110 Wn.2d 263, 281, 751 P.2d 1165 (1988); Kremer v. Audette, 35 Wn. App. 643, 648, 668 P.2d 1315 (1983).

that the foster mother's rebuttal testimony was improper because the defense did not have advance notice of the hearsay statements she would be offering into evidence. The child victim hearsay statute, RCW 9A.44.120, provides that

> A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement.

This requirement, in the context of rebuttal testimony, must be considered with another holding in White that is not error to admit rebuttal testimony even though the witness' name has not been endorsed upon the information or furnished to the defendant in advance of trial because genuine rebuttal witnesses need not be so listed.[64]

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[64] White, 74 Wn.2d at 395.

The State responds that it did disclose its intention to have B.A.'s foster mother testify at the close of the defendant's case. Moreover, she did not testify until a full day after the defense was told about the hearsay to which she would testify. The State argues that the content of the hearsay was no surprise and that the defense had the "fair opportunity to prepare to meet the statement" required by the statute, RCW 9A.44.120. Since the defense at no time requested a continuance or a chance to reopen its case, it cannot now argue that ample preparation time was lacking. In any event, the trial court considered this objection and rejected it, and did not commit a manifest abuse of discretion in so doing.

ISSUE SIX.

CONCLUSION. The trial court did not abuse its discretion in declining to allow

a psychologist to testify as an expert witness.

ER 702, which governs the admissibility of expert testimony, provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

This court has stated that the admissibility of expert testimony under ER 702 depends upon whether "(1) the witness qualifies as an expert, (2) the opinion is based upon an explanatory theory generally accepted in the scientific community, and (3) the expert testimony would be helpful to the trier of fact."[65] The decision whether or not to admit expert opinion

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[65] State v. Allery, 101 Wn.2d 591, 596, 682 P.2d 312 (1984); see also State v. Canaday, 90 Wn.2d 808, 812-14, 585 P.2d 1185 (1978).

evidence is within the discretion of the trial court and will not be disturbed absent a showing of an abuse of that discretion.[66]

At the trial of this case, the defense sought to qualify Dr. Ralph Underwager, a licensed psychologist, as an expert witness. He would have testified about how a child's memory capacity is affected by age and about the factors that create suggestion when an adult interviews a child, such as the adult's expectations.

The trial court ruled that the psychologist's proposed testimony was not proper because there was no indication that the results of the doctor's work had been accepted in the scientific community and because the testimony went directly to the

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[66] State v. Mak, 105 Wn.2d 692, 715, 718 P.2d 407, cert. denied, 479 U.S. 995 (1986); Keegan v. Grant Cy. P.U.D. 2, 34 Wn. App. 274, 282, 661 P.2d 146 (1983).

credibility of the victims and invaded the province of the jury. The trial court also ruled that the idea that interviews of children may be suggestive was within the general experience of the average person. The trial court reiterated its position in denying the motion for a new trial:

> [T]he Court remains convinced [the psychologist] did not have the qualifications to testify as a doctor, and that the offered testimony, in any event, was within the common experience of the jury. . . . the dangers of interviews of children . . . was [sic] within common experience of all of us. That was fully explored on cross-examination with other witnesses. [The psychologist] [w]as a researcher who did not have bona fide qualifications in the view of the Court. He was not involved in an independent research undertaking, but rather was approached to undertake research by an interested party with an interest [in] the outcome of the research. It is the Court's memory [the psychologist's] research was undertaken at the behest of the insurance industry relative to civil claims for child sexual abuse. The fact that three-and-a-half-year-old children are suggestible, I think, is within the common experience of any juror.

The Court of Appeals devoted attention to this issue because it felt that the offer of such evidence was likely to occur at the retrial it ordered. It concluded that the trial court did not abuse its discretion in excluding the psychologist's testimony. "We have reviewed the record and find that it does not sufficiently establish the reliability of the expert's methodology, factors, or the principles which he proposed to use in his testimony."

We agree. It was not shown at trial that the psychologist's position on child interviewing was accepted by the scientific community. Moreover, the argument that child interviews could be suggestive was amply aired during the cross examination of the State's witnesses and, as the trial court declared, was well within the understanding of the jury. The

psychologist's proposed testimony did not satisfy the test for admissibility set forth in ER 702 and was properly refused.

ISSUE SEVEN.

CONCLUSION. The trial court's statement here at issue revealed no personal attitudes toward the case or the evidence and did not constitute a prohibited comment on the evidence.

Article 4, section 16 of the Washington State Constitution prohibits a trial court from commenting on the evidence. The purpose of this provision is to prevent a jury from being influenced by knowledge conveyed to it by the trial judge as to the trial judge's opinion of the evidence submitted.[67] An impermissible comment is one which conveys to the jury a judge's personal attitudes toward the merits of the

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[67] State v. Jacobsen, 78 Wn.2d 491, 495, 477 P.2d 1 (1970).

case or allows the jury to infer from what the judge said or did not say that the judge personally believed the testimony in question.[68]

The defendants claim that the trial court impermissible commented on the evidence in accepting Dr. Carol Jenny as an expert witness. The trial court's words are as follows, with the alleged comment emphasized:

> Well, I think the evidence establishes her qualifications in the general subject of sexual abuse of children. The court will accept her as an expert on that subject.

The Court of Appeals examined this issue and concluded that the trial court's statement was not a comment on the evidence. It held that "[t]he court's ruling merely indicates that the threshold

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[68] Hamilton v. Department of Labor & Indus., 111 Wn.2d 569, 571, 761 P.2d 618 (1988); State v. Ciskie, 110 Wn.2d 263, 283, 751, P.2d 1165 (1988).

query provided in ER 702 was satisfied. The court offered no opinion as to the credibility, sufficiency, or weight of Dr. Jenny's testimony."

We agree. A court must be allowed to rule as to the qualifications of expert witnesses and inform counsel of its decision. The trial court did not that in its ruling regarding Dr. Jenny and did not offer a personal opinion about the doctor's testimony. There was no comment on the evidence in accepting the doctor as an expert witness.

ISSUE EIGHT.

CONCLUSION. There was no error in the trial court's evidentiary ruling in question since the court did not strike the defendant's explanation from the record.

The ruling here challenged occurred when the defendant William Swan was testifying on direct:

Q. Was there a situation where your

daughter made reference to the bathroom and described or used a word to describe the bathroom?

A. Yes.

Q. Okay. I'll ask you to recall for the jury, recount to the jury what that situation was.

A. Okay. I was in the process of using the bathroom in question, which happens to be across the hall from her room, with the door locked, as is my habit. She came up, turned the door knob and, of course, the door didn't open, and then she tried it again, and so I told her, "Just a minute, [B.A]," and then she started banging on the door a bit. I said, "Just a minute, [B.A], I'll be out in just a minute," and then she started crying and carrying on and saying "Daddy, Daddy is in my potty".

Q. Was that her phrase for the bathroom, "My potty?"

A. Yes.

[Prosecutor]: I would object as -- I am sorry, I do object to that question and answer on the basis of lack of foundation at this point, ask that it be stricken.

THE COURT: Sustained.

Defense counsel did not pursue this line of questioning but went on to ask the defendant about medication he gave to his daughter. The defendants contend on appeal, however, that the objection as to

lack of foundation was insufficient and improper.

The admission and exclusion of relevant evidence is within the sound discretion of the trial court. This is yet another place in the trial of a case where the trial court's decision will be reversed absent a manifest abuse of discretion.[69]

While the lack of foundation objection may be considered a general objection, general objections are not prohibited.[70] According to one Washington practice text:

> The court may sustain or overrule a general objection in light of its own understanding of the merits of the objection or the evidence offered.
> . . .
> If the trial court sustains a general objection, the ruling will be affirmed if there was any valid basis for excluding the evidence.

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[69] Maehren v. Seattle, 92 Wn.2d 480, 488, 599 P.2d 1255 (1979), cert. denied, 452 U.S. 938 (1981); Chhuth v. George, 43 Wn. App. 640, 648, 719 P.2d 562, review denied, 106 Wn.2d 1007 (1986).

[70] 5 K. Tegland, Wash. Prac., Evidence § 10, at 32 (3d ed. 1989).

(Footnotes omitted.) 5 K. Tegland, Wash. Prac., Evidence §10, at 32, 35 (3d ed. 1989).

A valid basis for sustaining the objection to the "potty" question was that it was a leading question improperly used on direct examination.[71] Thus, we could affirm the court's ruling on that ground. More to the point, however, is the wording used to sustain the objection. The trial court merely ruled "sustained". It did not strike the testimony, as the deputy prosecuting attorney requested, nor did it instruct the jury to disregard it. The defendant's testimony thus remained in the record for the jury's consideration and defendants' position on this issue is without merit.

ISSUE NINE.

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[71] 5A K. Tegland, Wash. Prac., Evidence § 250, at 281 (3d ed. 1989); ER 611(c).

CONCLUSION. No reversible error was committed in the deputy prosecuting attorney's closing argument since the jury was instructed to disregard the only statement objected to and since none of the other statements now claimed to have been erroneous was so flagrant, ill-intentioned, or prejudicial as to require reversal.

Defendants argue that each of four statements made by the deputy prosecuting attorney during closing argument constitutes reversible error. Two of the statements (emphasized immediately below) descried some of the testimony given by Dr. Parris, the Swans' family physician, and were part of the State's rebuttal argument:

> (By the deputy prosecuting attorney): Dr. Parris said, "I'm not an expert. I don't do this. If you want to prove your innocence, take the child to Harborview immediately." What did the Swans do? They asked C.P.S. to take the child to Dr. Parris.
>
> (Defense counsel): Objection, Your Honor. The last two statements are not in evidence and are not

> reflecting the truth. I would request they be stricken.
>
> (Deputy prosecuting attorney): I'm speaking with reference to [the CPS caseworker].
>
> (Defense counsel): [The caseworker] is not a party to the conversation.
>
> THE COURT: Sustained. I don't recall that. The jury will disregard that remark.
>
> (Deputy prosecuting attorney): There's no evidence of any request that this child be rushed to Harborview so they could prove their innocence. Instead, the child was taken to someone who said, "I don't know about this. I'm not an expert."

(Italics ours.)

The third allegedly prejudicial argument (emphasized below), also made during the State's rebuttal argument, described the medical evidence given by Thomas Ritter, the nurse practitioner who examined B.A.:

> The other thing is all this talk about hymens. I thought it was quite clear, Dr. Jenny, Dr. Ciliberti, all the people say the presence or the nonpresence of a hymen doesn't mean a thing. Mr. Ritter said in his notes he did not note a hymen. And, thinking back, he thinks it means there was not there -- one there. That was his recollection. Dr. Parris said he did not note one in his report, but he sort of assumes

> he saw one. So whether it was there or not or present is sort of up in the air.

(Italics ours.)

The final challenged remark (emphasized below) was part of the deputy prosecuting attorney's descriptions of B.A. and R.T.:

> Between the two of them -- We know that [B.A.] had no sex education from her parents. That was pretty clear. And he also know that neither child had trouble with lying. That wasn't something that came out, that there were problems with these children lying or that these were children you had to watch carefully. These were little girls who could talk, you could trust, they told the truth.

(Italics ours.)

At trial, the defense objected to only the first of the foregoing statements, the one regarding Dr. Parris.

We have consistently held that unless prosecutorial conduct is flagrant and ill-intentioned, and that the prejudice resulting therefrom so marked and enduring that corrective instructions or admonitions

could not neutralize its effect, any objection to such conduct is waived by failure to make an adequate timely objection and request a curative instruction.[72] Thus, in order for an appellate court to consider an alleged error in the State's closing argument, the defendant must ordinarily move for a mistrial or request a curative instruction.[73] The absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an

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[72] State v. Charlton, 90 Wn.2d 657, 661, 585 P.2d 142 (1978); State v. Brown, 29 Wn.App. 770, 774, 630 P.2d 1378, review denied, 96 Wn.2d 1013 (1981).

[73] 13 R. Ferguson, Wash. Prac., Criminal Practice and Procedure § 4006, at 404 (1984).

appellant in the context of the trial.[74] Moreover, "[c]ounsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for a new trial or an appeal."[75]

Defense counsel did object to the statement regarding Dr. Parris. The objection was sustained, and the jury was instructed to disregard the prosecutor's remark. While this statement was not supported by the evidence, it was not prejudicial error that denied the defendants a fair trial since the jury is presumed to follow the court's instructions

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[74] State v. Miller, 66 Wn.2d 535, 537, 403 P.2d 884 (1965); State v. Walton, 5 Wn. App. 150, 152, 486 P.2d 1118 (1971).

[75] Jones v. Hogan, 56 Wn.2d 23, 27, 351 P.2d 153 (1960); State v. Atkinson, 19 Wn.App. 107, 111, 575 P.2d 240, review denied, 90 Wn.2d 1013 (1978).

to disregard it.[76]

Defense counsel voiced no objection to the prosecutor's second reference to Dr. Parris' testimony, i.e., "There's no evidence of any request that this child be rushed to Harborview so they could prove their innocence. Instead, the child was taken to someone who said, 'I don't know about this. I'm not an expert.'"

It is true that B.A. never was taken to the Sexual Assault Center at Harborview Medical Center. At trial, Dr. Parris testified that before he examined B.A., he recommended to the defendants that she be examined at a sexual assault center to see if the alleged abuse had occurred. CPS originally took B.A. to nurse practitioner Thomas Ritter for a physical examination.

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[76] State v. Knoll, 87 Wn.2d 829, 835, 558 P.2d 173 (1976); State v. Fondren, 41 Wn. App. 17, 25, 701 P.2d 810, review denied, 104 Wn.2d 1015 (1985).

No one took the child to Harborview.

The context of the deputy prosecuting attorney's arguments here objected to is as follows. In the defendants' closing argument, it was defense counsel who argued that the failure to take B.A. to Harborview was the fault of CPS, and that this failure meant that the prosecution lacked the medical evidence needed to prove its case. The deputy prosecuting attorney's subsequent effort, in rebuttal argument, to blame the defendants for that omission was both a response to the defense argument and an inference that could be drawn from the evidence presented at trial. While Dr. Parris did not testify in the exact words the deputy prosecuting attorney quoted, his testimony could reasonably lead to the inference that the defendants never took B.A. to someone who was an expert on sexual abuse.

Counsel must be accorded a reasonable latitude in argument to draw and express inferences and deductions from the evidence.[77] Moreover, remarks of the deputy prosecuting attorney that would otherwise be improper are not grounds for reversal where they are in reply to defense counsel's statements unless the remarks are so prejudicial that an instruction would not cure them.[78] While not absolutely accurate, the statement attributed to Dr. Parris in argument was made in response to defense counsel's argument and under the circumstances was not so flagrant and ill-intentioned as to result in prejudice that could not have been cured by a timely

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[77] State v. Johnson, 40 Wn. App. 371, 381, 699 P.2d 221 (1985); State v. Hunter, 35 Wn. App. 708, 715, 669 P.2d 489, review denied, 100 Wn.2d 1030 (1983).

[78] State v. Davenport, 100 Wn.2d 757, 761, 675 P.2d 1213 (1984) (citing State v. La Porte, 58 Wn.2d 816, 822, 365 P.2d 24 (1961)).

objection and a curative instruction.

The statement regarding Thomas Ritter's medical findings also is technically incorrect, since Ritter testified that he did not note whether B.A. had a hymen. However, as the deputy prosecuting attorney's argument shows, the evidence about the presence or absence of a hymen was fairly murky. Ritter found an enlarged vaginal opening but did not note whether the hymen was missing. Dr. Parris did not note the presence or absence of the hymen, but apparently saw the hymenal ring. Dr. Jenny noted the lack of a specific finding regarding the hymen but concluded that Ritter's ability to see inside the vagina meant that he could see the hymenal opening.

In closing argument, the defense attempted to discredit Ritter's findings, stating that "he obviously did not do a

close examination." The defense also referred to Dr. Parris' observation of a hymenal ring. Then on rebuttal, the State stated somewhat less than artfully that Ritter thought his failure to note a hymen meant that one was absent, and that Dr. Parris assumed he saw one. Neither statement is completely accurate. Closer to the mark is the State's last reference to the subject: "So whether it was there or not or present is sort of up in the air."

Here again, we do not perceive the error made in argument about the Ritter statement to be prejudicial. The deputy prosecuting attorney's references to the medical evidence were equivocal, as was the medical testimony itself. An objection and a request for a curative instruction could have remedied any misstatement or potential for prejudice. The failure to object to

this reference waived the objection.

The final remark the defendants object to is the State's reference to the girls' truthfulness. It is, of course, improper for a prosecutor to express a personal opinion about the credibility of a witness during closing argument.[79] However, prejudicial error does not occur until it is clear that the prosecutor is not arguing an inference from the evidence, but is expressing a personal opinion.[80] The credibility of two State witnesses was "strenuously attacked" by defense counsel in State v. Papadopoulos, 34 Wn. App. 397, 399, 662 P.2d 59, review denied, 100 Wn.2d 1003 (1983). In closing argument, the

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[79] State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); State v. Robinson, 44 Wn. App. 611, 624, 722 P.2d 1379, review denied, 107 Wn.2d 1009 (1986).

[80] Robinson, 44 Wn. App. at 624; State v. Papadopoulos, 34 Wn. App. 397, 400, 662 P.2d 59, review denied, 100 Wn. 2d 1003 (1983).

prosecutor stated that

> "[the witnesses] have testified honestly before you", and, . . .that "[t]he gist of what they have said has been the truth."

Papadopoulos, 34 Wn. App. at 399.

The Court of Appeals did not see those statements as an expression of personal belief on the prosecutor's part, holding that the argument viewed in context revealed that the prosecutor merely called the jury's attention to the facts and circumstances in evidence tending to support the witnesses' credibility.[81]

In this case, evidence was introduced showing that both B.A. and R.T. were well-behaved, normal children who did not have a problem with lying. There was no objection to this testimony. Nor was there any objection when the deputy prosecuting attorney recalled this testimony in closing

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[81] Papadopoulos, 34 Wn. App. at 400.

argument and then went on to describe the facts and circumstances that supported the girls' credibility. Thus, it is clear to us that the deputy prosecuting attorney was simply drawing a reasonable inference from the evidence -- indeed, simply repeating the evidence -- and was properly recounting the testimony concerning the girls' truthfulness. Even were we to view the arguments as error, however, it was not of such an egregious sort that a curative instruction could not have removed any resulting prejudice. The deputy prosecuting attorney's arguments here complained of were apparently not viewed as prejudicial at trial, nor do they so appear on appeal. The State did not commit reversible error during closing argument.

ISSUE TEN.

CONCLUSION. The abuse of discretion standard is appropriate standard of review

under RCW 9A.44.120.

The determination of whether statements are admissible under the statutory child abuse hearsay exception is within the sound discretion of the trial court.[82] This is the standard of review generally applied to rulings on the admissibility of evidence.[83]

Defendants contend that this standard of review is erroneous because any ruling on the admissibility of child hearsay involves fundamental constitutional issues. Where constitutional rights are involved, an appellate court will independently evaluate the evidence to see if such rights

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[82] State v. Justiniano, 48 Wn. App. 572, 579, 740 P.2d 872 (1987); State v. Frey, 43 Wn. App. 605, 611, 718 P.2d 846 (1986).

[83] State v. Jones, 112 Wn.2d 488, 496 n.7, 772 P.2d 496 (1989); Caruso v. Local Union 690, Int'l Bhd. of Teamsters, 107 Wn.2d 524, 535, 730 P.2d 1299, cert. denied, 484 U.S. 815 (1987).

have been violated.[84]

It is clear, however, that even when such an independent review is undertaken, the trial court's findings are entitled to great weight.[85] This is because the trial court is "in a prime position to observe and evaluate the demeanor of witnesses."[86] As the Court of Appeals has explained, the appellate court

> will independently examine the record to determine if fundamental constitutional rights have been denied. In considering credibility, however, deference will be made to the trial court, which had the opportunity to evaluate the witnesses' demeanor below. We will review the trial court's inferences and conclusions, but not its findings as to credibility or the weight to be given evidence.

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[84] See State v. Daugherty, 94 Wn.2d 263, 269 616 P.2d 649 (1980), cert. denied, 450 U.S. 958 (1981); State v. Agee, 89 Wn.2d 416, 419, 573 P.2d 355 (1977).

[85] Daugherty, 94 Wn.2d at 269; Agee, 89 Wn.2d at 419.

[86] State v. Miller, 22 Wn. App. 960, 963, 593 P.2d 177, review denied, 92 Wn.2d 1031 (1979).

(Citations omitted.) In re Bugai, 35 Wn. App. 761, 765, 669 P.2d 903 (1983).

The admissibility of child hearsay statements does touch upon constitutional rights such as the right of confrontation guaranteed by the Sixth Amendment. However, the admissibility of child hearsay depends upon a series of decisions made only after evaluating the competency and credibility of witnesses. The trial court must conduct a hearing during which it determines (a) that the time, content, and circumstances of the statement provide sufficient indicia of reliability and (b) that the child either may testify or is incompetent as a witness. If the child is incompetent, the court must determine whether there is corroborative evidence of the act before admitting the hearsay

statements.[87] Appellate courts will carefully review the evidence and testimony presented in evaluating the exclusion and admission of child hearsay statements even under the abuse of discretion standard.[88] Appellate courts also recognize, however, that the trial court is in the best position to make the decisions as to competency and credibility. The abuse of discretion standard, as applied in child hearsay cases, does not ignore the constitutional issues at stake, but acknowledges the obvious, that the trial court is the only court that sees the children and listens to them and to the other witnesses in such a case.

ISSUE ELEVEN.

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[87] RCW 9A.44.120.

[88] See e.g., State v. Jones, 112 Wn.2d 488, 722 P.2d 496 (199); State v. Justiniano, 48 Wn. App. 572, 740 P.2d 872 (1987).

CONCLUSION. We adhere to our previous decisions upholding the constitutionality of the child victim hearsay statute, RCW 9A.44.120.

This court decided this issue in State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984). Defendants recognize this, but contend that the court in Ryan improperly relied on factually distinguishable cases in holding that RCW 9A.44.120 is constitutional. The cases relied on in Ryan that the defendant questions are Ohio v. Roberts, 448 U.S. 56, 65 L. Ed. 2d 597, 100 S. Ct. 2531 (1980) and Dutton v. Evans, 400 U.S. 74, 27 L. Ed. 2d 213, 91 S. Ct. 210 (1970). Both cases involved the admission of hearsay testimony, which is clearly relevant to any discussion of RCW 9A.44.120, and both are recognized as key cases on the admissibility of out-of-court

statements.[89]

Defendants urge this court to rely instead on Coy v. Iowa, ___ U.S. ___, 101 L. Ed. 2d 857, 108 S. Ct. 2798 (1988) in assessing the admissibility of child hearsay. At issue in Coy was the constitutionality of a screen placed between the defendant and two child victims while they testified in court. Coy does not contain the factual parallels to this case that are allegedly absent from Roberts and Dutton. Nor does the legal analysis in Coy seem directly relevant here. The United States Supreme Court in Coy held that the screen violated the confrontational clause and was unconstitutional.[90] The confrontational clause guarantees the defendant a face-to-

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[89] See Coy v. Iowa, ___ U.S. ___, 101 L.Ed. 2d 857, 108 S. Ct. 2798, 2800 (1988).

[90] Coy, 108 S. Ct. at 2803.

face meeting with witnesses appearing before the trier of fact.[91] The Court in Coy expressly left open the question of whether any exceptions to the right to face-face confrontation exist.[92] The Court cited Roberts after stating that "[w]hatever they may be, they would surely be allowed only when necessary to further an important public policy."[93]

Thus, the United States Supreme Court has not held that the admission of child hearsay statements violates any provision of the federal constitution. We adhere to our holding in Ryan that RCW 9A.44.120 is constitutional.

ISSUE TWELVE.

CONCLUSION. The State did not knowingly withhold exculpatory evidence from the

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[91] Coy, 108 S. Ct. at 2803.

[92] Coy, 108 S. Ct. at 2803.

[93] Coy, 108 S. Ct. at 2803.

defense is violation of due process.

This contention was raised earlier in connection with Issue Two. The defendants argue that the prosecution suppressed evidence regarding Lisa Conradi's sexual abuse and thus violated their right to due process. Defendants maintain that Conradi's predisposition to discover sexual abuse should have been a central issue at trial.

The prosecutor has a constitutional duty to disclose exculpatory matter to the defense.[94] "This duty is breached where the omitted evidence, evaluated in the context of the entire record, creates a reasonable doubt as to defendant's guilt that did not otherwise exist."[95]

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[94] State v. Bebb, 108 Wn.2d 515, 522, 740 P.2d 829 (1987); see also State v. Campbell, 103 Wn.2d 1, 17, 691 P.2d 929 (1984), cert. denied, 471 U.S. 1094 (1985).

[95] Bebb, 108 Wn.2d at 522; see also Campbell, 103 Wn.2d at 17.

The evidence allegedly showing that the State possessed information about Conradi's abuse is the following statement made by the State when Conradi was being deposed:

> When asked if she had ever been abused or about the individual who had abused her two sons, the prosecutor advised Conradi not to answer unless relevancy could be shown.

Supplemental Brief of Petitioner, at 10.

Apart from the fact that no attempt to require the witness to answer this question or establish relevancy was ever made, it does not follow that the State suppressed information about Conradi's abuse. Even if the State had suppressed such information, however, we fail to see what it was exculpatory evidence that could have created a reasonable doubt as to the defendants' guilt that did not otherwise exist. Witness Conradi's credibility was strenuously challenged at trial, and her alleged predisposition to discover sexual

abuse was also argued. Moreover, Conradi was not the only witness to reveal the girls' hearsay statements. Other witnesses repeated equally damaging hearsay. Nothing suggests that further evidence of witness Conradi's alleged predisposition to discover abuse would have exculpated the defendants. We perceive no error in this regard and no due process violation.

The Court of Appeals is reversed and the convictions of the two defendants in the trial court are affirmed.

/s/ Andersen, J.
ANDERSEN, J.

WE CONCUR:

/s/ Callow, C.J.	/s/ Dolliver, J.
/s/ Utter, J.	/s/ Durham, J.
/s/ Brachtenbach, J.	/s/ Smith, J.
/s/ Dore, A/C/J	Pearson, J.P.T.

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 55393-9
	)	
Petitioner,	)	ORDER CLARIFYING
	)	ATTORNEYS'
v.	)	STATUS
	)	IN OPINION AND
WILLIAM ORR SWAN, and	)	DENYING MOTIONS
KATHLEEN ROWLAND SWAN,	)	FOR MODIFICATION
and each of them,	)	AND
	)	RECONSIDERATION
Respondents.	)	

IT IS HEREBY ORDERED that the opinion in the above case, as the same appears at 114 Wn.2d 613, is clarified at the request of Respondents' counsel by adding to the end of footnote 1 on Page 618 of the opinion the following sentence: "Defendants' attorney at the trial court were not the same attorneys as represented them at the appellate court level."

IT IS FURTHER ORDERED that, aside from the foregoing, the motions for modification and reconsideration filed herein are denied.

DATED this 22nd day of June, 1990.

/s/ Callow, C.J.
CHIEF JUSTICE

APPROVED:

/s/ Utter, J.

/s/ Andersen, J.

/s/ Brachtenbach, J.

/s/ Durham, J.

/s/ Dolliver, J.

/s/ Smith, J.

/s/ Dore, A/C/J